Supreme Court
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No. 02-___

IN THE

Supreme Court of the United States

KEVIN WIGGINS,
Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Fourth Circuit held that under 28 U.S.C. § 2254(d)(1), a state court application of established federal law will satisfy the "objectively reasonable" standard of review set forth in *Williams v. Taylor*, 529 U.S. 362 (2000), so long as it is "minimally consistent with the facts and circumstances of the case." The questions presented are:

1. Does the Due Process standard of *Jackson v. Virginia* require a court to consider "all of the evidence" in deciding whether a reasonable factfinder could have found guilt beyond a reasonable doubt, as this Court held in *Jackson* and the First, Fifth and Seventh Circuits have likewise held, or may a conviction based entirely on circumstantial evidence be upheld under *Jackson* by considering only the evidence consistent with guilt and ignoring all evidence refuting guilt, as the Fourth Circuit held in this case.

2. Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Kevin Wiggins was the appellee below. Thomas R. Corcoran, warden of the Maryland Correctional Adjustment Center, and J. Joseph Curran, Jr., attorney general of the State of Maryland, were appellants below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Wiggins respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, reported at 288 F.3d 629 (4th Cir. 2002), is reprinted at Pet. App. 1a-26a. The decision of the United States District Court for the District of Maryland, reported at 164 F. Supp. 2d 538 (D. Md. 2001), is reprinted at Pet. App. 28a-89a. The order of the United States Court of Appeals for the Fourth Circuit, denying rehearing and rehearing *en banc*, is set forth at Pet. App. 157a-158a.

JURISDICTION

The Court of Appeals' judgment was entered May 2, 2002. A timely petition for rehearing and rehearing *en banc* was

denied May 29, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. 159a-162a.

STATEMENT OF THE CASE

A. Background

On September 17, 1988, an elderly white woman named Florence Lacs was found drowned in the bathtub of her apartment in Woodlawn, Maryland. Her apartment had been ransacked. Five days later, the police found two African Americans, Kevin Wiggins (then age 27) and his girlfriend Geraldine Armstrong (then age 42), traveling in Ms. Lacs' car. They were both arrested and charged with murder and robbery.

No direct evidence established how Ms. Lacs died. No witnesses saw her attacked. No one confessed to the crime. No forensic evidence pointed toward a suspect. The state knew only that Wiggins and Armstrong had Ms. Lacs' car and credit cards, and that the credit cards had been used beginning on September 15 at several stores. Armstrong's fingerprints (but not those of Wiggins) were found on the charge slips. Items purchased with the cards were found with Armstrong and Wiggins when they were arrested. The state's theory was that Ms. Lacs was murdered on the 15th before her credit cards were used later that evening. The state alleged Wiggins was the murderer because he was working as a painter in Ms. Lacs' apartment building.

The murder and robbery charges against Geraldine Armstrong were never pursued. Armstrong, however, had repeated uncounseled conversations with the prosecutors, and

testified against Wiggins before the Grand Jury and at trial. Armstrong had taken a polygraph examination while in custody. According to the examiner's report, Armstrong answered dishonestly when asked whether she had been in the victim's apartment and had participated in the murder.[1] Additionally, one of Armstrong's brothers lived in an apartment directly underneath that of the victim. Another of Armstrong's brothers fought with Wiggins, brandishing a gun, when Wiggins had arrived at Geraldine's home on the evening of the 15th. CA App. 98. Despite having all charges against her dropped, Armstrong testified that she received no leniency in return for her testimony.

B. The Guilt/Innocence Trial

Two public defenders, Carl Schlaich and Michelle Nethercott, represented Wiggins. Schlaich had previously second-chaired one capital case. Nethercott had never represented a capital defendant, and had less than one year of overall experience. Shortly after the appointment, Schlaich left Baltimore County to lead the Harford County defender's office. He spent one day per week on his lingering Baltimore County responsibilities. CA App. 1176-77. Nethercott thus had principal responsibility for trial preparation. Shortly after this case ended, Schlaich was fired as a public defender.

Wiggins waived a jury trial and was tried before the Honorable J. William Hinkel of the Baltimore County Circuit Court. The prosecution's opening statement noted that Ms. Lacs was last seen alive on September 15, 1988, that Wiggins was working near her apartment that day, and that Wiggins was in possession of Ms. Lacs' car and credit cards at about 8 p.m. that night. *Id.* 21-24. The prosecution claimed that Wiggins

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[1]Court of Appeals Joint Appendix ("CA App.") 1399.

murdered Lacs at 5 p.m. on the 15th, and indicated that this could be proved by "conversations" Wiggins had with two inmates while incarcerated after his arrest. *Id.* 24.

The prosecution called John McElroy and Christopher Turner to substantiate Wiggins' alleged admissions. Both had met Wiggins for the first time in prison. On cross-examination, McElroy acknowledged that he "made up" the central elements of his testimony against Wiggins. *Id.* 58. Cross-examination similarly undermined Turner by establishing that he had been clinically diagnosed as actively psychotic, and had a long history of providing information in exchange for sentencing leniency. Both witnesses testified that they were cooperating in this case in order to secure reduced sentences for pending convictions. *Id.* 54-55, 131-38, 164-65.

Apart from these witnesses, the case was entirely circumstantial. The prosecution called three witnesses to try to tie Wiggins to the crime – Chianti Thomas (then an eleven-year old girl), Geraldine Armstrong, and Robert Weinberg (Wiggins' employer). On September 15, Thomas had been visiting a friend who lived across the hall from Ms. Lacs. Thomas testified that, while standing in the apartment hallway at about 5 p.m., she observed an African American man come up the stairs and speak briefly to Ms. Lacs about having moved some sheetrock. *Id.* 83-86. The prosecution repeatedly asked Thomas whether she could identify anyone in the courtroom as the person she saw that day, but she could not. *Id.* 86, 90. Thomas also testified that the police had asked her to make a photographic identification shortly after the murder, and that she picked the photo of "the man that had looked the closest to the man" she saw on the 15th. *Id.* 92. On cross-examination, Thomas testified that the person she saw on the 15th had left the building immediately after his brief conversation with Ms.

Lacs, while Ms. Lacs was still alive. *Id.* 93. There was no evidence that this person ever returned.

Geraldine Armstrong testified that Wiggins had arrived at her home at 8 p.m. on the 15th, and asked to come in to wash off the paint from his work. CA App. 97-98. She also testified that her brother Adolphus began an argument with Wiggins that quickly escalated to a serious altercation in which her brother pulled a gun. She then testified that she and Wiggins left to go shopping in Ms. Lacs' car and used Ms. Lacs' credit cards to purchase items for Armstrong and her child. She initially denied familiarity with the Woodlawn apartments, but eventually admitted that her brother Melvin lived directly beneath Ms. Lacs. *Id.* 102.

Robert Weinberg testified that Wiggins was in his employ painting apartments adjacent to that of Ms. Lacs on the 15th, and that Wiggins had appeared in his office sometime around 4:45 p.m. and was released for the day. *Id.* 202. Weinberg further testified that Wiggins returned 20 minutes later, stating that he had moved some sheetrock. *Id.* 838. According to Weinberg's testimony, it would have taken at least five minutes to walk from the office to Lacs' apartment, a couple of minutes to move the sheetrock, and another five minutes or more to return to the office. *Id.* 839, 843. Weinberg testified that Wiggins had in fact moved the sheetrock. *Id.* 197.

Lacking any direct evidence that Ms. Lacs died between the time when Thomas allegedly saw Wiggins and when Wiggins later allegedly arrived at Armstrong's home, the prosecution called a medical examiner, Dr. Margarita Korell, to establish that Lacs died on the 15th. Korell, however, ultimately testified that it was impossible to ascertain when Ms. Lacs died. *Id.* 264-68. Korell had previously signed a death certificate stating that Ms. Lacs died on September 16th.

The prosecution also elicited testimony from Ms. Lacs' friends. Edith Vassar testified that she had been with Lacs on Thursday, September 15. Vassar, however, testified that she "received a phone call" from Lacs on Friday the 16th. CA App. 67. On cross-examination, she reiterated that she was "quite sure" she spoke to Lacs on Friday. *Id.* 69. Vassar reported the conversation to the police, and thereafter received a call from an unknown person trying to convince her she must be in error. *Id.* 71. The prosecution also called Mary Elgert and Elizabeth Lane. Elgert testified that Ms. Lacs was wearing a blue skirt on the 15th. *Id.* 75. Lane had given the police a missing persons report indicating that Ms. Lacs was wearing a red dress on the 15th. *Id.* 390-391.

Finally, the prosecution presented forensic evidence. A detective testified that he recovered a baseball cap with a Ryder logo in Ms. Lacs' apartment, as well as fingerprints inside the entrance door, on the kitchen wall, and on the bathroom doorjamb. CA App. 217, 222. Three prints were of "comparison value," but none matched Wiggins. *Id.* 233-35, 356. No hairs and fibers from the cap matched those taken from Wiggins. *Id.* 284-285. Another detective testified to the extensive ransacking of Ms. Lacs' apartment. *Id.* 300-38. He also testified that a latex glove had been found on Wiggins. *Id.* 350. There was no evidence that the glove contained traces of the substances (such as Black Flag or cleanser) found in Ms. Lacs' tub.

The defense then presented its case, which consisted principally of the testimony of Dr. Gregory Kaufman, an expert in forensic pathology. Kaufman testified that Lacs died no earlier than 3 a.m. on September 17. *Id.* 452-53.

During closing arguments, the prosecution disavowed its jailhouse witnesses (McElroy and Turner), asserting that "we would like to distance ourselves from them as far as possible."

Id. 544. Thus, by the end of the evidentiary submissions the prosecution failed to prove that Wiggins admitted the murder, presented no forensic evidence indicating Wiggins entered Ms. Lacs' apartment or was involved in the murder, and failed to present any eyewitness testimony or other direct evidence proving Wiggins' guilt. Additionally, the state's own witnesses contradicted the state's case in critical respects. Chianti Thomas, on whom the prosecution relied to establish Wiggins' presence near Ms. Lacs' apartment on the 15th, testified that the person she saw left the building while Ms. Lacs was still alive. Edith Vassar testified that she was certain she spoke to Ms. Lacs on September 16. The state nevertheless contended that Wiggins must have been the murderer because he was near the apartment on the 15th, and (according to Geraldine Armstrong) possessed Ms. Lacs' car and credit cards by 8 p.m. that night.

C. The Conviction

The trial court convicted Wiggins. The court rejected the testimony of McElroy and Turner. CA App. 546-47. The court nevertheless concluded that Wiggins must have committed the murder. That conclusion rested on a chain of inferences. The court concluded that Ms. Lacs must have been robbed before her car and credit cards were used on the evening of the 15th; that the robbery must have occurred when Ms. Lacs' apartment was ransacked; and that Ms. Lacs must have been murdered when the apartment was ransacked. Because Wiggins was present at a time when (in the court's view) the robbery and ransacking must have occurred and had possession of the stolen items, the court concluded that Wiggins must have been the murderer.

In reaching that result, the trial court purported to disavow reliance on "any presumption arising from the recent possession of stolen property." CA App. 550. The court stated that it was instead relying on "all the evidence," but did not

identify what evidence supported the judgment. *Id.* The court rejected Ms. Vassar's testimony that Ms. Lacs was alive on Friday the 16th, stating that it was inconsistent with what the court described as "overwhelming" evidence that Ms. Lacs died on the 15th. *Id.* 548-50. The court rejected the defense's expert forensic testimony for the same reason, and not because the expert's methods or analysis were flawed in any way. The court made no mention of the absence of any forensic evidence placing Wiggins in the victim's apartment, or of the evidence showing that someone else had been in the apartment. The court likewise did not mention Chianti Thomas's testimony that the man she saw on the 15th left the building while Ms. Lacs was still alive.

D. Sentencing

After entering the verdict, the trial court granted a continuance to permit the defense to prepare for sentencing. When proceedings recommenced in October 1998, Wiggins' counsel requested jury sentencing, despite having chosen a judge trial to decide guilt because Baltimore County juries are too "bent towards guilt" and "death oriented." CA App. 1213.

Wiggins' counsel opted to "retry guilt" by arguing that Wiggins was not a principal in the first degree under Maryland law. *Id.* 1192-93, 1199. They knew, however, that all prospective jurors would receive an instruction that Wiggins "has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs." *Id.* 570. Similarly, counsel knew that after the evidence had been submitted, the judge would instruct the jury that "Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." *Id.* 982. Wiggins' counsel was thus forced to concede in

closing that Wiggins "has been convicted" and that the jury "cannot change that." *Id.* 1018. Counsel could only suggest that it might be "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins." *Id.* 1019. In response, the prosecution reiterated the judge's instructions that Wiggins "has been convicted of first degree murder and robbery" and that the jurors' duty was to "consider his crime" and "weigh that . . . against what you know about his background." *Id.* 1034, 1038. The jurors, however, knew nothing of that background. Wiggins' counsel conducted no additional investigation or preparation for the sentencing beyond what they had done for trial, and they introduced no mitigation evidence. Thus, when the jury weighed the crime against Wiggins' background, they knew only the stipulated fact that Wiggins had no prior convictions. The jury condemned Wiggins to death.

A divided Maryland Court of Appeals affirmed the conviction and sentence.

E. State Postconviction Proceedings

In 1993, Wiggins filed a petition for postconviction relief with the state court. The evidentiary hearing focused on allegations that Wiggins had not received effective assistance of counsel. The evidence established that defense counsel had not investigated or prepared a mitigation case. Indeed, each lawyer testified that the other was responsible for doing so. Pet. App. 52a. Counsel failed to prepare a social history or hire an expert to do so, despite knowing that funds were available for that purpose and that such analyses were a routine practice in their office. Pet. App. 53a; CA App. 1193-94.

The social history submitted to the postconviction court showed that Wiggins suffered horrible abuse. His mother was a chronic alcoholic. Pet. App. 165a-166a. During his

childhood, she frequently left him and his sisters alone for days at a time. *Id.* 54a, 166a-167a. She would hide food from her children before she deserted them, leaving them to beg for food or pick it from trash cans. *Id.* 166a-167a. The children often went hungry for days; at times Kevin had nothing to eat but paint chips. *Id.* 167a. When Mrs. Wiggins was home, she would have sex in front of the children, sometimes while they were in the same bed. *Id.* 171a. If Mrs. Wiggins found that her children had eaten any of the food in the house, she would beat them with belts, straps, even furniture. *Id.* 167a-168a. On one occasion, according to Wiggins' sister, the mother forced Wiggins' hands against a hot stove burner to punish him. *Id.* 154a, 169a-171a.

As a result of this abuse, Wiggins and his sisters were placed in foster care when Wiggins was six. Pet. App. 173a. His initial foster mother's methods of discipline included biting the children and twisting their flesh. *Id.* 54a, 175a-176a. That abuse led to the children being moved again. *Id.* The second foster mother beat the children with straps and belts. *Id.* 176a. Her husband repeatedly molested and raped Wiggins during the young boy's years in the home. *Id.* 54a, 177a-179a. Shortly after this sexual abuse began, Wiggins lost interest in eating, and became so malnourished that he was hospitalized. *Id.* 179a. An I.Q. test taken at this time indicated a borderline retardation level of 72. *Id.* 181a.

At age 16 Wiggins ran away from home, lived on the street for a time, and spent brief periods in other foster homes. Pet. App. 184a-188a. He eventually returned to his second foster home because it provided some stability. *Id.* 188a. After a few months, however, Wiggins was again moved. *Id.* 189a. In the next foster home, he and other foster children were raped repeatedly by the foster mother's sons. *Id.* 54a,190a. When

Wiggins was 18, an examination indicated mental retardation, cranial pathology, and possible head trauma. *Id.* 192a.

Based on this evidence, the state postconviction court ruled from the bench that trial counsel had been ineffective:

> I don't even remember a death penalty case that there was not this social history done. . . . Not to do a social history, at least to see what you have got, to me is absolute error. I just — I would be flabbergasted if the Court of Appeals said anything else. I really don't think that is even a close question.

CA App. 1431. The court also found, based on the documents and testimony, that Wiggins' trial counsel did not know of this mitigation evidence. *Id.* at 1437. Three and a half years later, however, the court issued a final written decision that made no mention of the prior ruling and concluded that counsel's failure to investigate mitigation evidence was a permissible "trial tactic." Pet. App. 155a-156a.[2] The court did, however, reaffirm that Wiggins' counsel did not know of the mitigating evidence presented during the postconviction hearing. *Id.* 142a n.269; *see also id.* 53a & n.15. A divided Maryland Court of Appeals affirmed. *Id.* 92a-130a.

F. District Court Proceedings

Wiggins filed a timely petition for relief pursuant to 28 U.S.C. § 2254 on August 6, 1999. Applying the standard of review applicable under 28 U.S.C. § 2254(d)(1), as explained in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), Chief Judge Motz granted the petition.

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[2]Because of its length (256 pages) the opinion has been excerpted in the Appendix to this petition. The entire opinion can be found at CA App. 1451-1707.

The court invalidated Wiggins' conviction because the Maryland courts had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, a criminal conviction denies due process if a reasonable factfinder could not have concluded that every element of the offense was proved beyond a reasonable doubt. The court explained why the evidence could not support upholding the conviction under that standard. Pet. App. 42a-50a.

The district court invalidated Wiggins' death sentence on the ground that the state courts had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). That result, the court concluded, followed *a fortiori* from *Williams v. Taylor*, 529 U.S. 362 (2000). As in *Williams*, Wiggins' counsel had failed to investigate and prepare a case in mitigation. Similarly, it would have been unreasonable to find a lack of prejudice because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a. The court declined to distinguish *Williams* on the ground that counsel's conduct here was a legitimate trial tactic. Such a conclusion was unreasonable, the Court held, for two reasons. First, counsel's decision to "retry" guilt was uninformed, and therefore unreasonable, because counsel had no appreciation of the strength of the mitigation case they might have presented. Second, counsel's choice here was so ill-advised that it could not be justified even had it been informed. *Id.* 55a.

G. The Fourth Circuit's Ruling

Invoking circuit precedent predating this Court's decision in *Williams v. Taylor*, the Fourth Circuit held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. Applying

that "minimal consistency" standard, the court reversed Chief Judge Motz and reinstated both the conviction and sentence.

With respect to the conviction, the court held that the state court decision was "minimally consistent with the historical record of facts" because the Maryland Court of Appeals had rejected the conclusion that the robbery and murder were committed after the theft of the victim's car and personal property, Pet. App. 13a, and because the state trial judge had purported to rely on "all the evidence" and not merely a presumption arising from Wiggins' possession of stolen goods. *Id.* 14a n.5. To the extent the court examined the evidence independently (as opposed to merely asking whether the state courts had applied the correct legal standard), it concluded that the state courts had applied *Jackson* reasonably. *Id.* 13a-17a. The Fourth Circuit concluded that it could reasonably be inferred that Ms. Lacs died on September 15, "thus implicating Wiggins in more than mere theft or robbery," and that Wiggins had ample time (30 minutes, in the court's view) to commit the murder and robbery. *Id.* 15a-16a. The court did not discuss most of the evidence contradicting that inference, including the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment (a particularly telling absence given that Wiggins was painting that day and thus could have been expected to leave paint residue behind) and the forensic evidence indicating that someone other than Wiggins had been in the apartment. Nor did the court mention the alternative hypothesis, discussed by the district court, that the Armstrongs were responsible for the crime. Thus, the court never analyzed whether a consideration of all of the evidence could support beyond a reasonable doubt the conclusion that Wiggins murdered Ms. Lacs.

With respect to sentencing, the Fourth Circuit held that the district court erred in concluding that *Williams v. Taylor*

had any bearing on the question whether the state court had applied *Strickland v. Washington* unreasonably. According to the court, *Williams* "merely reaffirms the long settled rule . . . that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." Pet. App. 19a. Concluding that any similarity between this case and *Williams* was "superficial," the Fourth Circuit held that "*Williams* did not establish a *per se* rule that counsel must develop and present an exhaustive social history." *Id.* 20a. Here, the court held, Wiggins' trial counsel "knew" the key facts of Wiggins' childhood – including physical abuse by his mother, and sexual abuse by foster parents – because social service records disclosed those facts. For this reason, the court believed that counsel had investigated sufficiently to justify the "strategic choice" to forego mitigation in favor of retrying guilt. *Id.* 21a. The court did not mention the specific factual findings of the state postconviction court that Wiggins' counsel did not know about Wiggins' history of abuse and that the social service records did not document that history. *See* page 11 *supra*. Nor did the court mention the district court's ruling, which was based on an examination of the social service records (*see* Pet. App. 53a n.15), that those records did not contain evidence of abuse.[3] The court also held, citing pre-*Williams* Fourth Circuit precedent, that "the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness," *id.* 23a – even though Wiggins had no criminal record and nothing in that evidence suggested a predisposition to violence.

[3]In seeking rehearing, Petitioner pointed out this error and provided a complete set of the records for the court's review. The petition was denied without comment. Pet. App. 157a-158a. Those records have been lodged with the Clerk of this Court.

Chief Judge Wilkinson concurred. Though stating his view that Wiggins "very probably committed the heinous offense for which he stands convicted," the Chief Judge was unable to "say with certainty that he did so," and noted "unexplained items" of evidence such as "the unidentified fingerprints, baseball cap, fibers and hairs" as well as the fact that Wiggins "had no prior record." Pet. App. 24a. Judge Niemeyer also wrote separately. He questioned whether "the State court reasonably applied *Strickland*," noting that "[counsel] could have . . . insisted on arguing liability and still have maintained that any death sentence would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." *Id.* 25a. He nevertheless concurred, though without full confidence in the result. *Id.* 26a.

REASONS FOR GRANTING THE PETITION

This case warrants review for two reasons. First, the Fourth Circuit's application of *Jackson v. Virginia* conflicts with *Jackson* itself as well as decisions of other Courts of Appeals. If left uncorrected, that decision will effectively eliminate *Jackson* claims in postconviction proceedings under § 2254(d) in the Fourth Circuit. Second, the Fourth Circuit's application of *Strickland v. Washington* directly conflicts with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000) (reversing Fourth Circuit's misapplication of *Strickland* in § 2254(d) context), as well as numerous decisions of the Courts of Appeals both before and after *Williams*. Indeed, the Fourth Circuit's *Strickland* ruling reflects a persistent refusal to recognize what this Court and other Circuits recognize as fundamental: in a capital case, counsel must investigate potential mitigating evidence, and cannot make a "reasonable" tactical decision to forego a mitigation case at sentencing absent such an investigation.

More generally, the decision in this case makes clear that the Fourth Circuit continues to be in conflict with the teachings of this Court, and the law of other Circuits, respecting the appropriate standard of review under § 2254(d)(1). In *Williams v. Taylor*, this Court held that the proper standard of review in a federal habeas case is whether the state court's application of federal law was "objectively reasonable." *Id.* at 409. *Williams* rejected the Fourth Circuit's far more deferential approach, which authorized relief only if the state court "applied federal law in a manner that reasonable jurists would all agree is unreasonable." *Id.* (quotation omitted).[4]

Although it paid lip service to *Williams* in this case, the Fourth Circuit actually applied a standard of review as lax as the one this Court previously rejected. Invoking pre-*Williams* precedent that set forth the very standard this Court invalidated in *Williams*, the Fourth Circuit held that to survive review under § 2254(d)(1) a state court decision need only be "minimally consistent with the facts and circumstances of the case." Pet. App. 11a (quoting, *inter alia*, *Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998)). But it is obvious that a state court's application of federal law can be objectively unreasonable even though it is "minimally consistent" with "the facts and circumstances." The Fourth Circuit thus simply repackaged the standard this Court rejected in *Williams*.

In this regard, the Fourth Circuit is in conflict not only with *Williams* but also with the Second, Third, Eighth and Ninth Circuits. As the Second Circuit explained: "Some

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[4]Even before *Williams*, the Third and Eighth Circuits had applied an "objective unreasonableness" standard, and had criticized the Fourth Circuit's "all reasonable jurists" standard as insulating from review "all but those decisions so off the mark that they approach judicial incompetence." *Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999); *see also Matteo v. Superintendent*, 171 F.3d 877, 889-90 (3d Cir. 1999) (en banc).

increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *See Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks and citation omitted). The Third and Eighth Circuits similarly ask "whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified." *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2000) (internal citation and quotation omitted), *cert. denied,* 122 S. Ct. 396 (2001); *see also Boyd v. Minnesota*, 274 F.3d 497, 500 (8th Cir. 2001) (same). And the Ninth Circuit has interpreted *Williams* as reinforcing the standard previously established by the Third and Eighth Circuits: "[T]he court adopted an 'objectively unreasonable' standard, employing the language used in decisions by the Third and Eighth Circuits. . . . The Supreme Court thus chose to adopt the interpretation of AEDPA that espoused the more robust habeas review." *Van Tran v. Lindsey*, 212 F.3d 1143, 1150-51 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000); *accord Gunn v. Ignacio*, 263 F.3d 965, 971 (9th Cir. 2001). *See also Neal v. Puckett*, 286 F.3d 230, 235-36 (5th Cir. 2002) (en banc) (endorsing and applying more stringent standard after *Williams*), *petition for cert. filed,* (U.S. June 13, 2002) (No. 01-10886).

Because it reflects no real change from its pre-*Williams* standard, the Fourth Circuit's "minimal consistency" test conflicts with the law of these Circuits. Parallel circumstances exist in the First Circuit which, like the Fourth Circuit here, refused to alter its supine standard of review after *Williams*. In the First Circuit, it remains the case that "a state court decision is objectively unreasonable only if it 'falls outside the universe of plausible, credible outcomes.'" *Mastracchio v. Vose*, 274 F.3d 590, 597 (1st Cir. 2001) (quoting the pre-

Williams decision of *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)). Other Circuits have criticized that test as inconsistent with *Williams*, *see Van Tran v. Lindsey*, 212 F.3d at 1151; *Francis S. v. Stone*, 221 F.3d at 111, just as they criticized the First Circuit's test in decisions preceding *Williams*. *See Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999) ("outside-the-universe-of-plausible-outcomes test excludes all but those decisions so off the mark that they approach judicial incompetence"); *Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999).[5]

There thus remains a pressing need to bring clarity and national consistency to the standard of review applied under § 2254(d)(1). As this case vividly confirms, the Fourth Circuit's lax "minimal consistency" test will, in its specific applications, continue to generate conflicts with other Circuits applying established federal law in cases under § 2254(d)(1) and will deny habeas petitioners in that Circuit the right to review that Congress has prescribed.

I. THE FOURTH CIRCUIT'S ADJUDICATION OF PETITIONER'S *JACKSON V. VIRGINIA* CLAIM CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that proof beyond a reasonable doubt was a "substantive constitutional standard." *Id.* at 317. *Jackson* replaced the "no

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[5]The Seventh Circuit has in the past articulated a "minimal consistency" test, but recently clarified its law in a manner that accords with the Second, Third, Eighth and Ninth Circuits, stating that "[i]n making this determination, we do not 'defer' to the state court decision; AEDPA does not provide for the *Chevron* deference afforded administrative agencies," and that its review was "not so limited as to require a finding of judicial incompetence before we are allowed to overturn a state court's decision." *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), which had provided that due process was satisfied unless there was no evidence supporting a conviction. 443 U.S. at 316. As *Jackson* made clear, "it could not seriously be argued that . . . a 'modicum' of evidence [which would satisfy the 'no evidence' test] could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320 (internal quotation marks omitted).

The Fourth Circuit's holding that the Maryland courts applied *Jackson* reasonably in this case conflicts with *Jackson* itself, and conflicts in principle with the holdings of other Circuits in two ways.

First, the decision conflicts with *Jackson*'s clear teaching that "[a] federal court has a duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." *Jackson*, 443 U.S. at 318. Here, the panel accepted at face value the state trial judge's bare assertion of the thoroughness of his approach and the state appellate court's acquiescence in that assessment. That is plainly insufficient to discharge a federal court's duty under § 2254(d)(1), as other Circuits have recognized. In *Hurtado v. Tucker*, 245 F.3d 7, 18 (1st Cir.), *cert. denied*, 122 S. Ct. 282 (2001), the First Circuit made clear that in deciding whether a state court has applied *Jackson* unreasonably, a federal habeas court must assess the evidence independently and cannot rely on the state court's conclusion that the evidence was sufficient. *Id.* ("Even with the deference due by statute to the state court's determination, the federal habeas court must itself look to 'the totality of the evidence' . . . . The failure of the state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable.") In *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1463 (2002), the Fifth Circuit likewise made

clear that the state court's mere invocation of the *Jackson* standard does not obviate the requirement of an independent review of the evidence.

Second, the Fourth Circuit's decision conflicts with *Jackson*'s requirement that the reasonable doubt inquiry be based on "*all of the evidence*," 443 U.S. at 319 (emphasis in original), and not merely the evidence that might support a conviction. As the district court explained, neither the state trial court's guilty verdict nor the Maryland Court of Appeals' application of *Jackson* in evaluating that verdict ever explained how a reasonable factfinder could have found guilt beyond a reasonable doubt based on *all* of the evidence. Instead, those courts ignored the most important evidence contradicting the hypothesis of guilt. Specifically, the state courts did not come to grips with the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment – evidence that would certainly have existed had he been in the apartment at 5 p.m. on September 15 immediately after a day of painting and working with sheetrock. Nor did those courts attempt to explain the forensic evidence (the fingerprints and the Ryder cap) indicating that someone else was in the apartment when Ms. Lacs was murdered. These courts similarly neglected the role of the Armstrongs, even though Geraldine (like Wiggins) had the victim's car and possessions on the evening of September 15, and was initially charged with the murder and robbery.

The courts likewise did not consider the plausibility of the state's theory that Wiggins entered Ms. Lacs' apartment, thoroughly ransacked it, ran a tub full of water, drowned Ms. Lacs, and found and stole all the items in the few minutes that would have been available to do so under the state's view of the facts. Contrary to the Fourth Circuit's unsupported statement, the evidence does not permit the inference that Wiggins had 30 minutes to commit this crime. His employer testified that he

was gone approximately 20 minutes. CA App. 838. Although it would only have taken two minutes or so to move the sheetrock, it would have taken at least five minutes to walk from the employer's office to Ms. Lacs' apartment and another five to walk back. *Id.* 839, 843. Additionally, Wiggins spent time in conversation with Ms. Lacs and then left the building. When that is factored in, there would have been a few minutes at most available to Wiggins – an interval not even remotely sufficient to do what he is convicted of having done. And that assumes Wiggins actually returned to Ms. Lacs' apartment after Chianti Thomas saw him leave, a supposition that lacks any evidentiary support.

Indeed, the *only* way in which Wiggins' conviction can be described as supported by the record is to ignore this contradictory evidence. *Jackson*, however, permits only "reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. And *Wright v. West*, 505 U.S. 277 (1992), did not change that rule. Although the Court made clear that the evidence need not eliminate every plausible hypothesis of innocence, that decision did not purport to establish that reviewing courts can ignore "all of the evidence" in applying *Jackson* and focus myopically on only the evidence supporting a hypothesis of guilt. That is particularly true in cases – such as this one – where the conviction rests entirely on inferences from circumstantial evidence.

Unlike the Fourth Circuit here, other Courts of Appeals applying *Jackson* in cases under § 2254(d)(1) have recognized their duty to guard against "conjecture camouflaged as evidence." *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001). In *Piaskowski*, for example, the Seventh Circuit made clear that under *Jackson* "each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." *Id.* Similarly, in *United States v. Coleman*, No. 99-50018, 2001

U.S. App. LEXIS 18004, at *6-*7 (9th Cir. Aug. 7, 2001) (unpublished), the Ninth Circuit determined that an inference insufficiently supported by the record could not sustain a finding of guilt beyond a reasonable doubt. *Cf. United States v. Hall*, 999 F.2d 1298, 1299-1300 (8th Cir. 1993) ("We believe that while a reasonable mind might have followed the path outlined by the government, it would nevertheless still have had to entertain a reasonable doubt with respect to the identity of the perpetrator . . . of the crime"). The Fourth Circuit's approach in this case is at odds with those decisions.[6] If left uncorrected, the Fourth Circuit's "minimal consistency" approach to evaluating *Jackson* claims under § 2254(d)(1) will, as a practical matter, eliminate the substantive protection of *Jackson* in cases under that provision.

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[6]In a case decided before Congress amended § 2254 in 1996, the Fourth Circuit applied *Jackson* correctly. "Favoring the prosecution with all inferences does not mean that we ignore evidence that is in the record, but which they ignore." *Evans-Smith v. Taylor*, 19 F.3d 899, 910 n.29 (4th Cir. 1994). In *Evans-Smith*, the Fourth Circuit condemned as inconsistent with *Jackson* the very reasoning that the state courts employed in this case to convict Wiggins and to affirm that conviction – *i.e.* reasoning backward from the conclusion that Wiggins committed the murder and rejecting all evidence inconsistent with that hypothesis. The Fourth Circuit did not mention the *Evans-Smith* decision in its opinion in this case, even though it was briefed extensively and was discussed in the petition for rehearing – thus suggesting that the Fourth Circuit believes its "minimal consistency" standard of review under § 2254(d)(1) obviates any need to determine whether a state court has applied established federal law incorrectly.

II. THE FOURTH CIRCUIT'S APPLICATION OF *STRICKLAND V. WASHINGTON* CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*, AS WELL AS THE DECISIONS OF OTHER CIRCUITS.

This Court should also grant review of the Fourth Circuit's extraordinary ruling that *Strickland v. Washington* does not impose on capital counsel a duty to investigate potential mitigation evidence, and that counsel's choice to forego putting on mitigation evidence is "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background. Pet. App. 17a. That decision conflicts with *Williams v. Taylor* as well as the prevailing law of the circuits.

In rejecting the district court's conclusion that *Williams v. Taylor* governed this case, the Fourth Circuit asserted that "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history . . . in a capital murder case." Pet. App. 19a. Rather, the court opined, *Williams* "merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)). But that plainly misreads *Williams*. It was not an Eighth Amendment case about a defendant's right to present mitigating evidence; it was a Sixth Amendment case about counsel's obligation to investigate and present that evidence. And *Williams* did not state, or even remotely imply, that only "particularly glaring failure[s]" would raise issues under *Strickland v. Washington*. Pet. App. 19a. To the contrary, the *Williams* Court found ineffective assistance because "trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation

evidence" and "failed to present evidence showing that Williams had a deprived and abused upbringing." 529 U.S. at 415 (O'Connor, J., concurring).[7]

This case is not materially different from *Williams*. Like Williams, Wiggins was abused and then abandoned by his mother. Like Williams, Wiggins was placed in abusive foster care settings. Like Williams, Wiggins was borderline mentally retarded. In addition, Wiggins was subject to ongoing sexual abuse by his foster father, as well as sexual abuse in other foster homes. Wiggins was also homeless for a significant portion of his adult life, as well as part of his adolescence. But unlike Williams, Wiggins had no criminal record or history or violence. In *Williams*, the state introduced significant evidence of the defendant's future dangerousness. Indeed, the dissenting opinion noted that Williams had engaged in a life-long crime spree, and noted the "strong evidence that [Williams] would continue to be a danger to society, both in and out of prison." *Williams*, 529 U.S. at 419 (Rehnquist, C.J., concurring in part and dissenting in part). Here, in contrast, the prosecution introduced no evidence (apart from the underlying facts of the crime) to support the death sentence in Wiggins' case.[8]

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[7] *Bell v. Cone*, 122 S. Ct. 1843, 1854 (2002), is not to the contrary. In *Bell*, trial counsel presented vast mitigating evidence during the guilt phase, thus demonstrating extensive investigation and preparation, and simply chose not to recall those witnesses at sentencing. *Id.* at 1852-53. But trial counsel "*investigated* the possibility of calling other witnesses," *id.* at 1853 (emphasis added), thereby satisfying the constitutional requisite. Furthermore, "the prosecution adduced overwhelming physical and testimonial evidence showing that respondent perpetrated the crimes and that he killed . . . in a brutal and callous fashion." *Id.* at 1847-48.

[8] The Fourth Circuit is also in conflict with *Williams* in its holding that counsel reasonably could have concluded that mitigation evidence would have done more harm than good. *See* Pet. App. 22a. In *Williams*, this Court made clear that counsel's performance was deficient, and that Williams

The Fourth Circuit sought to distinguish *Williams* on the ground that counsel here made a tactical decision to forego a mitigation case, whereas counsel in *Williams* merely defaulted on his responsibilities. In that regard, however, the Fourth Circuit's decision conflicts with the prevailing law in the Circuits in two related respects.

First, the Fourth Circuit has rejected the principle that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is *strictly observed*." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (emphasis added) (internal citation and quotations omitted). That principle was well-established in other Circuits before this Court's decision in *Williams*, and it has been pervasively reaffirmed since *Williams* was decided. *See Neal*, 286 F.3d at 236-37 (en banc) ("[W]e consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances.") (internal quotation omitted);[9] *Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (en banc); *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (noting that "the [*Williams*] Court held that counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitutes deficient performance"), *cert. denied*, 122 S. Ct. 2645 (2002); *Lindstadt v. Keane*, 239 F.3d 191, 200 (2d Cir. 2001) (noting

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suffered prejudice, even though "not all of the additional evidence was favorable to Williams" in that (unlike the evidence here) it included past criminal activity. 529 U.S. at 396.

[9] To assess counsel's performance under that standard, the Fifth Circuit "look[s] to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional 'leads' he had, and what results he might reasonably have expected from those leads." *Id.* at 237.

that *Williams* "[held] that a failure to investigate and present mitigating evidence during sentencing hearing constituted ineffective assistance"); *Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) (noting that *Williams* "[found] counsel ineffective because they failed to conduct an investigation that would have uncovered information graphically describing Williams' 'nightmarish childhood' and the fact that he had been severely abused by his father and placed in foster care."); *Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002). Whereas the prevailing law in other Circuits makes investigation of a capital defendant's background virtually a mandatory duty absent unusual circumstances, the Fourth Circuit considers it just one option among many for defense counsel.

Second, the Fourth Circuit's decision conflicts with the prevailing standards in other Circuits for determining when counsel has undertaken sufficient investigation to justify deferring to counsel's trial tactics. In this case, the Fourth Circuit held that counsel's decision should be considered "virtually unchallengeable," Pet. App. 17a, so long as counsel has "some knowledge about potential avenues of mitigation on behalf of a client" – irrespective of whether counsel follows up on that knowledge by investigating it. *Id.* 19a. Thus, the Fourth Circuit concluded in this case that counsel's knowledge of the rudimentary facts about a defendant's background (here, that he was taken from his mother and placed in foster care, and was of limited intelligence) *discharges* counsel's duty to investigate further. The prevailing law in other Circuits, however, is that possessing such evidence *triggers* the duty to investigate. *E.g. Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel had "a small amount of information" that necessitated further inquiry).

In *Coleman v. Mitchell*, for example, the Sixth Circuit similarly held that counsel could not make a reasoned decision to forego mitigation in favor of a residual doubt defense because counsel had not investigated, and therefore did not realize he could have presented, a powerful case based on the defendant's abused childhood. 268 F.3d at 447-54. *Accord Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"), *cert. denied*, 531 U.S. 1035 (2000). The Tenth Circuit has rejected as unreasonable counsel's decision to focus on "sympathy and mercy" rather than a mitigation case when counsel did not thoroughly investigate available mitigation evidence prior to choosing his strategy. *Battenfeld v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001). As both *Coleman* and *Battenfeld* explain, counsel who has not thoroughly investigated available defenses cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfeld*, 236 F.3d at 1229; *Coleman*, 268 F.3d at 447.

The Seventh, Eighth, Ninth and Eleventh Circuits apply similar tests. *See Washington v. Smith*, 219 F.3d 620, 633 (7th Cir. 2000); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Jackson v. Herring*, 42 F.3d at 1367 ("Thus, our case law rejects the notion that a strategic decision can be

reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotations omitted); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

In sum, the Fourth Circuit is fundamentally out of step with the Sixth Amendment principles established by this Court and applied in other Circuits. It should go without saying in a capital case that a decision as fateful as deciding to forego a mitigation defense cannot be reasonable unless it is fully informed. That much follows ineluctably from the bedrock proposition that "only when the jury is given a vehicle for expressing its reasoned moral response . . . in rendering its sentencing decision . . . can we be sure that the jury . . . has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 121 S. Ct. 1910, 1920 (2001) (internal citation omitted). Given the absolute centrality of mitigation issues to the sentencing judgment, counsel must know – and must be in a position to explain to their clients – what they will be giving up by foregoing mitigation and opting for a different sentencing defense (such as "retrying guilt"). This Court has recognized that fundamental point, and Courts of Appeals other than the Fourth Circuit routinely apply it.

Finally, the Fourth Circuit's analysis of the *Strickland* issue starkly illustrates why a "minimal consistency" standard of review is inappropriate under § 2254(d)(1). In reaching the conclusion that Wiggins' counsel was adequately informed about his background, the court correctly noted that counsel had gleaned some basic knowledge from social service records. Pet. App. 20a. But the court made a serious error in its further assumption that those records contained evidence of the abuse and neglect that prompted his placement in foster care (including having his hands burned as a child as a result of his mother's abuse), or of the sexual violence perpetrated against

him by foster parents and others, or of most of the other horrible realities of his youth. The state trial court, which took evidence and heard the testimony of Wiggins' trial counsel, made specific factual findings to the contrary. The district court, which examined the social service records, likewise concluded (in a ruling the Fourth Circuit does not mention) that they did not contain this information. Pet. App. 53a & n.15. Indeed, those records speak for themselves and contain none of what the Fourth Circuit assumed they contain. Thus, possession of those records cannot possibly have provided trial counsel with information sufficient to make an informed tactical decision to forego a case in mitigation.[10]

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[10]The Fourth Circuit's mistake was based in part on the Maryland Court of Appeals' equally erroneous assumptions about what the social service records contained. Pet. App. 20a-21a. As Chief Judge Motz explained, the Maryland Court of Appeals' contrary statement was entirely unreasonable; the social service records themselves demonstrate by clear and convincing evidence that such physical and sexual abuse is *not* referenced, and trial counsel had access to no other information. Pet. App. 53a-55a & n.15; 28 U.S.C. § 2254(d)(2), (e)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2002

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APPENDICES

Appendix A

United States Court of Appeals,
Fourth Circuit.

Kevin WIGGINS, Petitioner-Appellee,
v.
Thomas R. CORCORAN, Warden, Maryland Correctional Adjustment Center; William W. Sondervan, Commissioner of Corrections of the State of Maryland; J. Joseph Curran, Jr., Respondents-Appellants.

No. 01-23.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-99-2420-JFM)

Argued Jan. 24, 2002.
Decided May 2, 2002.

ARGUED: Ann Norman Bosse, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Respondents-Appellants. Donald Beaton Verrilli, Jr., Jenner & Block, L.L.C., Washington, D.C., for Petitioner-Appellee. ON BRIEF: J. Joseph Curran, Jr., Attorney General of Maryland, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Respondents- Appellants. Lara M. Flint, Brian P. Hauck, Jenner & Block, L.L.C., Washington, D.C., for Petitioner-Appellee.

Before WILKINSON, Chief Judge, and WIDENER and NIEMEYER, Circuit Judges.

Reversed by published opinion. Judge WIDENER wrote the opinion. Chief Judge WILKINSON wrote a concurring opinion. Judge NIEMEYER wrote a concurring opinion.

OPINION

WIDENER, Circuit Judge.

Introduction

The State of Maryland appeals from the district court's grant of Kevin Wiggins' 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court invalidated Kevin Wiggins' capital murder conviction under *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and death sentence under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The district court found that the Maryland Court of Appeals, although stating properly the governing principle of *Jackson v. Virginia,* applied it unreasonably in upholding Wiggins' capital murder conviction. Furthermore, the district court found that Wiggins' sentencing counsel was ineffective for failure to investigate and present a case in mitigation during sentencing in accord with *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). This court has jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I. *Facts*

Kevin Wiggins was indicted in the Circuit Court for Baltimore County, Maryland on October 20, 1988 for the

capital murder and robbery of Florence Lacs. Wiggins was also indicted on charges of burglary and theft. The State filed notice of intention to seek the death penalty. Wiggins elected a trial by judge, and after four days of trial, Judge Hinkel found Wiggins guilty of the first degree murder of Florence Lacs, robbery, and two counts of theft.

The evidence adduced at trial established that, on September 17, 1988 at approximately 3:50 p.m., Florence Lacs was found dead in her bathtub partially covered by cloudy water. She was wearing a blue skirt, white blouse, and white beads. This clothing was similar to or the same as the outfit Mrs. Lacs had worn on Thursday, September 15, 1988 when she accompanied her friend Mary Elgert to a luncheon. Mrs. Elgert testified that at the time Mrs. Lacs was wearing a blue skirt and white blouse. Mrs. Elgert also testified that Mrs. Lacs drove her home from the luncheon at about 4:00 p.m.

Elizabeth Lane, another acquaintance of Mrs. Lacs, passed by her apartment at approximately 4:00 p.m. on September 16 and noticed that her orange-red Chevrolet Chevette was not in the parking lot. A third friend, Edith Vassar, testified that she "received a phone call on Friday," September 16 and that she was "quite sure" it was Mrs. Lacs on the phone.[1] When Mrs. Lacs did not arrive at Mrs. Lane's home for a scheduled card game on September 17, Mrs. Lane became alarmed and called the police at around 2:00 p.m. She told the police that she had last seen Mrs. Lacs on September 15 and at the time Mrs. Lacs was wearing a red dress.

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[1] Edith Vassar testified that after she reported this conversation to the police, she received a phone call from an unknown person who tried to convince her that her recollection of the date of the conversation with Lacs was in error.

Upon arrival at Mrs. Lacs' apartment, the police found no evidence of forced entry, either at the doors or the windows, but that the apartment had been partially ransacked. Detective Ches testified that he found a baseball cap bearing a Ryder logo on the living room floor. Detective Ches found a wet cloth on the dining room table and a damp towel on Mrs. Lacs' bed. He further testified that he lifted several fingerprints from the inside of the entrance door, the kitchen wall, and on the bathroom doorjamb. In the bathtub, floating in the water, Detective Ches found a dark colored thread. Some kitchen cleaners and a can of Black Flag were observed on the bathroom floor. Detective Crabbs testified to the presence of two *T.V. Guides* on the coffee table in front of the sofa. One, dated September 10-16, had been marked in pen through September 15 and had a bookmark inserted in the pages for that date. The other copy, dated September 17-23, was unmarked.

Detective Butt analyzed the fingerprints taken from the crime scene. He identified two of them as coming from two of the officers at the scene, but the other prints did not match Wiggins or Mrs. Lacs. Furthermore, tests of the fibers and hairs from the hat and bathtub were not associated with Wiggins.

Dr. Margarita Korell, Assistant State Medical Examiner, performed an autopsy on Mrs. Lacs on the morning of September 18. Dr. Korell observed that Mrs. Lacs' lungs were bogey, that is to say contained fluid and were hyperinflated, a sign of drowning. Additionally, Dr. Korell testified that she observed trauma on the left hand (bruise) and an area of bleeding in the muscle that covers the thyroid cartilage. She testified that these latter injuries were caused by "some external force" consistent with a struggle prior to the victim's death. From this, Dr. Korell concluded that Mrs. Lacs was murdered. However, Dr. Korell could not determine the maximum period

Mrs. Lacs had been dead to any degree of medical certainty.

Chianti Thomas, a 12-year old resident of Mrs. Lacs' building, testified that on September 15, at some time between 4:30 and 5:00 p.m., she was visiting with Chantell Greenwood and Shanita Patterson at an apartment near Mrs. Lacs' apartment. When they left the apartment, Miss Patterson had trouble locking the door, and she sought Mrs. Lacs' assistance. A man approached and offered to help. Miss Thomas testified that, at between 5:00 and 5:30 p.m., she heard this man thank Mrs. Lacs for watching some sheetrock for him. Miss Thomas identified this man as Wiggins from a pre-trial photographic lineup. However, she was unable to identify Wiggins in court. Finally, Miss Thomas testified that after the conversation with Mrs. Lacs, Wiggins left.

Robert Weinberg, Wiggins' employer and construction contractor, was working at Mrs. Lacs' building at the time of her death. Weinberg testified that on September 14, Mrs. Lacs called out to Wiggins from her window expressing concern that a work truck might block her car. Weinberg assured her that the truck would not block her car. Weinberg testified that on September 15 he released Wiggins from work between 4:00 and 4:30 p.m., but that about 30 minutes later, Wiggins came back and told him that he had moved some sheetrock, a service Weinberg had not requested. Weinberg stated that this action would have taken only about 1-1/2 to 2 minutes, and that, although Wiggins reported for work on September 16, he left early because he said he was being evicted on that day.

Geraldine Armstrong, Wiggins' girlfriend, testified that Wiggins came to pick her up on September 15 in Mrs. Lacs' Chevette at around 7:45 p.m. After having an altercation resulting in Miss Armstrong's brother brandishing a handgun

at Wiggins, Wiggins and Miss Armstrong went shopping using the victim's credit cards. They went shopping again the next day in Mrs. Lacs' Chevette, purchasing a diamond ring at J.C. Penny's on Mrs. Lacs' credit card. On September 17th, they pawned a ring belonging to Mrs. Lacs. Miss Armstrong testified that Wiggins told her that he had found the car and that the credit cards belonged to his aunt.

On September 21, the police spotted Wiggins and Geraldine Armstrong driving Mrs. Lacs' Chevette. The Maryland Court of Appeals found that Wiggins made a statement to the police that Miss Armstrong "didn't have anything to do with this," and that he found Mrs. Lacs' car with the keys in it in a restaurant parking lot on September 16. According to that statement, the credit cards were in a bag on the floor, and Mrs. Lacs' ring was on the floor of the car. Wiggins was arrested and the police found a rubber glove in his pocket. A piece of this glove was tested for residual traces of the cleaners found in Mrs. Lacs' apartment. None were found. Wiggins admitted to using the credit cards and pawning the ring.

The State endeavored to prove that Wiggins admitted murdering Mrs. Lacs by offering the testimony of two inmates who were incarcerated along with Wiggins. The first inmate, John McElroy, testified that Wiggins told him that he hit Mrs. Lacs in the head with a bat, put her in the bathtub, and made off with $15,000 from her home. On cross examination, Wiggins' counsel elicited testimony that McElroy had a long history of PCP use and was currently prescribed to take Elavil, a mood altering drug.

The second inmate, Christopher Turner, testified that Wiggins told him that he had stolen Mrs. Lacs' car, beaten and

kicked her, then drowned her in the bathtub with lye or some other chemical in the water. Turner testified that Wiggins admitted to him that he had stolen the car, taken Mrs. Lacs' credit cards, money, and a ring from her finger, that he had used the credit cards to buy clothes and jewelry, and that he let his girlfriend use the credit cards. On cross examination, Wiggins' counsel elicited testimony that Mr. Turner had a long history of exchanging information to law enforcement for leniency, was suffering from active psychosis, and had entered into an agreement to limit sentencing on pending matters in exchange for his testimony.

The defense called an expert in forensic pathology, Dr. Gregory Kauffman, to challenge the State's theory of the cause of death (drowning) and also to establish that at the time of discovery and photography of the body on September 17, Mrs. Lacs had been dead no more than 18 hours. Dr. Kauffman asserted that drowning was unlikely because there were no signs of a struggle, but agreed that the death was a homicide. Finally, he testified that, within a reasonable degree of medical certainty, Mrs. Lacs' time of death was no earlier than 3 a.m. on Saturday, September 17.

At the close of the case, Judge Hinkel found Wiggins guilty of the murder of Mrs. Lacs, robbery, and theft. In his ruling, Judge Hinkel indicated that he did not believe either McElroy or Turner. He found that Wiggins was at Mrs. Lacs' apartment building "at a relevant time", that Mrs. Lacs died sometime on Thursday, September 15, and not any later. The judge also believed to be due to mistaken memory the evidence that Edith Vassar gave regarding the telephone call on the 16th and Elizabeth Lane's missing person's report, indicating that Mrs. Lacs was wearing a red dress on the 15th. In closing, the judge remarked, "[t]he defense argues that any presumption

that he is the robber is rebutted by the testimony of Miss Vassar, but my decision is not based on any presumption arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption."

Wiggins chose a jury for sentencing. Instead of developing a case in mitigation based on Wiggins' social history, defense counsel chose to question the essential fact that Wiggins was not the actual killer.[2] Defense counsel conceded that Wiggins had indeed been convicted of murder, but implored the jury that it might be "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins," and therefore, Wiggins was not a principal in the first degree, eliminating his eligibility for the death penalty. The defense introduced no mitigating evidence other than the stipulated statutory mitigating factor that Wiggins had no prior violent convictions. The jury sentenced Wiggins to death. The Maryland Court of Appeals affirmed the conviction and sentence, the sentence by a divided court. *Wiggins v. State*, 324 Md. 551, 597 A.2d 1359, 1367 (Md. 1991).

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[2] Under the Maryland statutory scheme, the proof concerning guilt required at a capital sentencing hearing is different from the proof required at the guilt or innocence stage of the trial. At the guilt or innocence stage, the State must prove beyond a reasonable doubt that the defendant is guilty of first degree murder. However, at the sentencing stage, the State must show beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. In other words, under Maryland law, he must be a principal in the first degree. See Md. Code Art. 27, § 413(e)(1); Md. Rule 4-343(3). "[T]he jury [at sentencing] still is required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer." *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 15 (Md. 1999).

Wiggins applied for state post-conviction relief, alleging that the failure to make out a case in mitigation based on his social history constituted ineffective assistance of counsel. In the state proceeding, Wiggins' counsel presented a social history report detailing Wiggins' history of physical, sexual, and mental abuse at the hands of his parents and guardians, and that his IQ indicated borderline mental retardation. From the bench, the court stated that Wiggins' trial counsel may have been ineffective in that they failed to have a social history prepared for mitigation, but expressed no opinion as to whether he had suffered prejudice or whether the decision was justified. However, in its formal opinion, the court found that counsel had made a "tactical decision and it was reasonable." A divided Maryland Court of Appeals affirmed. *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 17 (Md. 1999).

Wiggins filed a timely 28 U.S.C. § 2254 petition in the district court. The district court found that the Maryland Court of Appeals had unreasonably applied the standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), pertaining to sufficiency of the evidence challenges when it affirmed his convictions. See *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 554 (D. Md. 2001). Additionally, the district court found that Wiggins' counsel did not render effective assistance at sentencing. The district court based its decision in large part on the Supreme Court's recent decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), finding counsel ineffective for failure to investigate and present at sentencing his client's social history. The district court reasoned that "Wiggins's evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*," and concluded that Wiggins was entitled to relief. *Wiggins v. Corcoran*, 164 F. Supp. 2d at 557-60. The district

court explicitly found that Wiggins' case could not be distinguished on the ground that trial counsel had made a legitimate tactical decision because it found that a tactical decision to be reasonable must be based on a reasonable investigation which was not performed. *Wiggins,* 164 F. Supp. 2d at 558-59. The district court granted the petition, vacated the conviction and sentence, and ordered Wiggins released from the murder charge. 164 F. Supp. 2d at 576. However, the district court stayed its judgment pending our resolution of the State's appeal.

II. *Standard of Review*

As a result of the Antiterrorism and Effective Death Penalty Act's amendments to § 2254, our review of state criminal convictions is circumscribed. A federal court may only grant relief under § 2254 if it is shown that a decision of a state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently from [the Supreme] Court on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The "unreasonable application" grounds for granting the writ applies "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 412- 13, 120 S. Ct. 1495. See also *Bell v. Jarvis,* 236 F.3d 149, 157 (4th Cir. 2000) (en banc). However, a writ of habeas corpus may not issue if the federal

court, in its own judgment, decides that the state court decision applied clearly established federal law merely "erroneously or incorrectly." *Vick v. Williams,* 233 F.3d 213, 216 (4th Cir. 2000) (citation omitted). Instead, we must decide if the state court's application of federal law was objectively unreasonable. 233 F.3d at 216. We have said that the criterion of reasonableness for purposes of § 2254(d)(1) is "whether the [state court's] determination is at least minimally consistent with the facts and circumstances of the case." *Bell v. Jarvis,* 236 F.3d at 159 (quoting *Wright v. Angelone,* 151 F.3d 151, 157 (4th Cir. 1998) (citation omitted)).

Both of Wiggins' contentions here implicate the "unreasonable application" ground for relief under § 2254(d)(1) because the Maryland Court of Appeals identified the correct principles governing Wiggins' claims from Supreme Court precedent. We review *de novo* the district court's decision on a § 2254 petition based on a state court record. *Spicer v. Roxbury Correctional Institute,* 194 F.3d 547, 555 (4th Cir. 1999). Therefore, we must decide for ourselves whether the Maryland Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court.

III. *Wiggins'* Jackson v. Virginia *Claim*[3]

In *Jackson v. Virginia,* the Supreme Court stated that the "critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question to be answered in applying the standard is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S. Ct. 2781 (italics in original). Conflicting inferences presented by the facts in the historical record are presumed to have been resolved in favor of the prosecution "even if it does not affirmatively appear in the record, and we must defer to that resolution." *Jackson,* 443 U.S. at 326, 99 S. Ct. 2781; *Wright v. West,* 505 U.S. 277, 297, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). The Maryland Court of Appeals identified these

[3] Although *Jackson* announced the appropriate standard for sufficiency of the evidence review in habeas corpus cases, the Maryland court of appeals found it applicable to direct appeals in *Tichnell v. State,* 287 Md. 695, 415 A.2d 830, 842 (Md.1980), and subsequently applied it on direct appeal of Wiggins' conviction. This is the same method of analysis utilized by the Supreme Court in *United States v. Powell,* 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984), a case on direct appeal. There the Court equated the "substantial evidence" standard of *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), also a direct appeal case, with *Jackson*'s rationality test. See *United States v. Powell,* 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) ("Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt.") (citing *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), and *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

controlling principles of law correctly. *Wiggins v. State,* 597 A.2d at 1366-67. As stated above, it is our task to decide whether the state court's application of these precepts is unreasonable in this case: to do this we must decide whether the Court of Appeals' decision is minimally consistent with the historical record of facts. *Bell v. Jarvis,* 236 F.3d at 159. We conclude that it is; indeed, in our opinion, it is not only minimally consistent with, but fully supported by the record.

In deciding Wiggins' sufficiency claim on direct appeal, the Maryland Court of Appeals reviewed the trial court's findings of fact for clear error pursuant to state law and concluded that no such error was present. The Court stated that the trial judge "considered but rejected Wiggins's argument that the circumstances taken together, demonstrated a reasonable hypothesis of innocence." *Wiggins v. State,* 597 A.2d at 1367.[4] Furthermore, the Court of Appeals concluded that the trial judge explicitly "did not credit any of Wiggins's evidence that the robbery and murder were committed at a time subsequent to his theft of the victim's car and other personal property." 597 A.2d at 1367. Lastly, the Court stated that the conflicting testimony regarding time of death did not render the trial court's ultimate conclusion of guilt clearly erroneous. As such, the Maryland Court of Appeals found that there was sufficient evidence for a rational trier of fact to conclude, as Judge Hinkel did, that Wiggins robbed and murdered Mrs. Lacs on September 15. 597 A.2d at 1367.

A recitation of the facts found by the trial judge and the

[4] The Maryland rule which the trial judge considered in this case is more favorable to defendants than the federal rule. Compare *Wilson v. State,* 319 Md. 530, 573 A.2d 831, 834 (Md.1990), with *Jackson,* 443 U.S. at 320, 99 S. Ct. 2781.

inferences that could reasonably be drawn therefrom will demonstrate that the Maryland Court of Appeals applied *Jackson* reasonably.[5] Kevin Wiggins was working in Lacs'

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[5] The district court began its *Jackson* analysis by stating that only one piece of evidence supported an inference that Wiggins murdered Lacs, namely his possession of Mrs. Lacs' property. 164 F. Supp. 2d at 554. However, the court stated that Wiggins' conviction could not be sustained on that basis, because the trial judge had refused to draw that very inference. Stating that the Maryland Court of Appeals appeared to rely on that inference to affirm, the district court reasoned that it would be a violation of due process "for an appellate court, in affirming a conviction, to rely upon an inference that is only permissible and that was expressly rejected by the finder of fact." Accordingly, the district court proceeded to examine the record facts for other evidence of guilt, finding none. The district court, however, misapprehended the finding of the Maryland trial court and also the decision of the Maryland Court of Appeals. To repeat, what Judge Hinkel decided with respect to the recently stolen property follows:

> The defendant of course is in possession of recently stolen property. The defense argues that any presumption that he is the robber is rebutted upon testimony of M.S. Vassar, but my decision is not based on any presumption arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption. [J.A.550]

So the district court found that the Maryland trial court did exactly what the Maryland trial court did not do. It laid off the finding of the Maryland trial court solely to possession of Mrs. Lacs' property which had been recently stolen, the very thing that Judge Hinkel did not do, rather basing his decision on "all the evidence that I have weighed in this case and not by any presumption." Although we cannot know all the mental processes of Judge Hinkel, it may well be that he was aware of such cases as *West v. State,* 312 Md. 197, 539 A.2d 231 (Md.1988), in which the recent possession of a stolen money order after a purse snatching sufficed to support the crime of receiver but not stealing the money order. However that may be, and whatever the presumption may be in Maryland, Judge Hinkel did not rely on it, rather, as noted, he relied on "all the evidence that I have weighed in this case and not by any presumption." Judge Hinkel's

building on September 15, 1988. Wiggins was dismissed from work at or about 4:30 p.m. on that day. Wiggins had no legitimate reason to stay at work after the time his supervisor dismissed him, however, he returned to the building sometime after 4:30 p.m. While in the building, Wiggins was seen near Mrs. Lacs' apartment by Chianti Thomas, who also testified that Wiggins and Mrs. Lacs briefly conversed. When Wiggins returned from the building some 30 minutes later, he told his supervisor that he moved some sheetrock in the apartment building. This job, according to Wiggins' supervisor, would only have taken "a couple of minutes." Later that same night, Wiggins was found in possession of Mrs. Lacs' credit cards, her ring, and her car. There was evidence that Wiggins' girlfriend, who came with him that evening of September 15th, forged Mrs. Lacs' name to the credit card slips, while accompanied by Wiggins. The trial court could reasonably have drawn several inferences from these facts, that Wiggins was in the vicinity of Ms. Lacs' apartment sometime around 5:00 p.m. on the evening of September 15th, that he had ample

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trial decision as to consideration of the evidence was consistent with the direction in *Jackson* as to the review of evidence, that:

> the factfinder's role as weigher of the evidence is preserved through a conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. 443 U.S. at 319, 99 S. Ct. 2781 (italics in original).

And this quotation from *Jackson* was more recently repeated in *Wright v. West,* 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). The fact that the Maryland trial court did not rely on any presumption, in our opinion, did not prevent that court from its reliance on all of the evidence in the case, which included, among many other items, the fact that Mrs. Lacs' automobile, credit cards, and ring had been stolen at a time contemporaneous with her murder and that Wiggins was present at her house at that time.

time to steal Mrs. Lacs' property, approximately 30 minutes, and that his return to explain his presence on the job site was pre-textual.

The time of death was not established to a reasonable medical certainty by medical testimony at trial. In fact, the conclusions of the medical experts were discounted by the trial judge. However, that the time of death was not established to any scientific certainty is of little moment because ample evidence supported the conclusion that Mrs. Lacs was killed on the evening of September 15, thus implicating Wiggins in more than mere theft or robbery. First, there was the testimony of Mrs. Lacs' friends regarding her attire the last time she was seen alive. The testimony established that Mrs. Lacs was wearing a blue skirt, white blouse, and white beads when she was seen at her regular card game on the 15th. This was the same outfit that she was wearing when she was found dead on the 17th.[6] Furthermore, there was evidence that Mrs. Lacs had marked certain television programs of apparent interest in her *TV Guide,* and the last markings in the *TV Guide* were for September 15. As stated above, other testimony established that Mrs. Lacs was last perceived alive[7] on September 15,

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[6] This testimony was not without contradiction. Mary Elgert filed a missing persons report indicating that Mrs. Lacs was wearing a white blouse and red skirt when she was last seen on Thursday. The trial judge explicitly resolved the conflicting testimony in favor of the prosecution stating that Mrs. Elgert's recollection was simply wrong. It is the exclusive province of the trier of fact, save only for clear error, to resolve conflicting facts and credibility determinations at trial. The Maryland Court of Appeals reviewed the record evidence for clear error and found none. Nor is there any evidence that we can see that would indicate a result to the contrary.

[7] Edith Vassar testified that she received a call from Florence Lacs on the morning of September 16. The trial judge explicitly found that Mrs. Vassar did not correctly remember.

sometime between 4:00 and 5:00 p.m. when Chianti Thomas heard Wiggins thank Mrs. Lacs for watching some sheetrock for him. It was only a few hours later that Wiggins picked up Miss Armstrong in Mrs. Lacs' car and the two began using Mrs. Lacs' credit cards. Adding all the circumstances together, the trial judge concluded that Florence Lacs' robbery and murder occurred on the evening of September 15th and that Wiggins, being there at "a relevant time," was the robber and murderer. On this basis, the Maryland Court of Appeals found *Jackson v. Virginia* satisfied. We are of opinion and decide that the Maryland Court of Appeals' decision was not only at least minimally consistent with the record of facts found by the trial judge and thus was not unreasonable within the meaning of § 2254(d), it was fully supported by the record. Accordingly, we reverse the district court's grant of Wiggins' petition on this issue.

IV. *Wiggins'* Strickland *Claim*

We review Wiggins' claim *de novo* applying the same standard prescribed by § 2254(d) and find that the Maryland court's decision was a reasonable application of *Strickland. Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), establishes a two component, conjunctive test for ineffectiveness of counsel claims; namely that counsel's performance was deficient and that such performance prejudiced the defense. To establish deficient performance the defendant must show that counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687, 104 S. Ct. 2052. The reasonableness inquiry proceeds based on all of the facts and circumstances of the case "viewed as of the time of counsel's conduct." 466 U.S. at 690, 104 S. Ct. 2052. This performance prong is highly deferential to counsel's choices, and informed strategic decisions are virtually unchallengeable.

466 U.S. at 690, 104 S. Ct. 2052. A defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 489, 104 S. Ct. 1949 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). To establish prejudice, the defendant must show that but for counsel's deficient performance "there is a reasonable probability that . . . the result of the proceeding would have been different." 466 U.S. at 688, 104 S. Ct. 2052. A reasonable probability is one "sufficient to undermine confidence in the outcome of the proceeding." 466 U.S. at 694, 104 S. Ct. 2052. The Maryland Court of Appeals analyzed Wiggins' ineffectiveness claim under this standard. *Wiggins v. State,* 352 Md. 580, 724 A.2d 1, 12 (Md. 1999).

The district court found that Wiggins did not receive effective assistance of counsel at sentencing because his counsel failed to develop a social history exposing Wiggins' harsh childhood and sub-average mental capacity.[8] The district court decided that the Court of Appeals was unreasonable in its analysis of Wiggins' claim because it was purportedly "almost directly contrary to the Supreme Court's recent decision in *Williams v. Taylor.*" *Wiggins v. Corcoran,* 164 F. Supp. 2d at 557 (citation omitted). Upon its independent review of the claim, the district court found for Wiggins on the claim and thus granted his § 2254 petition on this aspect of the petition, as well as that the evidence did not support the judgment of conviction.

In *Williams v. Taylor,* counsel began preparing for sentencing one week before the proceeding and failed utterly to

[8] The district court did *not* find counsel ineffective with respect to the conviction, only as to the sentencing.

prepare any social history because of a misapprehension of state law regarding access to juvenile records. *Williams,* 529 U.S. at 395, 120 S. Ct. 1495. That social history would have disclosed a wealth of potentially mitigating evidence grounded in Williams' "nightmarish" childhood, as well as his being "borderline mentally retarded." In other words, counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice. It was this wholesale failure that led the Court to conclude that Williams did not receive constitutionally sufficient representation. *Williams,* 529 U.S. at 396, 120 S. Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

We think that despite any superficial similarities to the instant case, the district court's reliance on *Williams v. Taylor* to find the Maryland Court of Appeals' decision unreasonable was misplaced. First, *Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. *Williams,* 529 U.S. at 393, 120 S. Ct. 1495; see also, e.g., *Penry v. Lynaugh,* 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland,* and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. See *Strickland,* 466 U.S.

at 691, 104 S. Ct. 2052. Secondly, even if *Williams* did establish such a *per se* rule, it would not have been "clearly established" within the meaning of § 2254, as the *Williams* case was decided more than a year after the Maryland Court of Appeals' decision here. See *Booth-El v. Nuth,* 288 F.3d 571 (4th Cir. 2002). Finally, despite the district court's contention to the contrary, we are of opinion that Wiggins' counsel made a reasonable strategic decision and neither *Williams,* as it may apply here, nor any of *Strickland*'s other progeny, require a different conclusion.

Wiggins' sentencing counsel, Mr. Schlaich, did know about Wiggins' difficult childhood, as the district court acknowledged. *Wiggins v. Corcoran,* 164 F. Supp. 2d at 559. During the evidentiary hearing in the Maryland courts, Mr. Schlaich stated that he knew of some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen. He knew, for example, that Wiggins had been removed from his natural mother as a result of a finding of neglect and abuse; that there were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded. So any inference that his knowledge and investigation was merely casual or offhand is simply not so. Although further investigation would have developed more extensive details of Wiggins' childhood, the extant records did inform Schlaich of a possible avenue of mitigation. The district court concluded, however, that the knowledge Schlaich gained through these reports put him on notice and required him to inquire further. This was error. When considering claims of ineffectiveness, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled."

Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting *United States v. Cronic,* 466 U.S. 648, 665, n. 38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). In this connection, the Supreme Court has indicated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitations on investigation." *Burger v. Kemp,* 483 U.S. at 794, 107 S. Ct. 3114. The Maryland Court of Appeals determined that Schlaich's knowledge of potential mitigation avenues was sufficient to make an informed strategic choice. We think that the Maryland Court of Appeals' decision in this regard was reasonable.

The attorneys viewed the case against Wiggins at the guilt phase to be quite flimsy. Furthermore, because of the conflicting medical testimony as to time of death, the lack of direct physical evidence affirmatively placing Wiggins in Florence Lacs' apartment, and existence of other evidence, such as the Ryder hat found in Mrs. Lacs' apartment, Schlaich "believed that [Wiggins'] best hope of escaping the death penalty was for one or more of the jurors to entertain a reasonable doubt as to," 724 A.2d at 15, whether Wiggins was the actual killer. Add to that the stipulated fact of Wiggins' clear record. On the other hand was Wiggins' social history. As stated above, Schlaich had knowledge of some of Wiggins' social history from the presentence investigation report and social services records and likely knew that additional development would have resulted in more sordid details surfacing. Nonetheless, Schlaich decided that social history evidence was problematic in that it tended to conflict with any attack on principalship: Counsel would present a picture to the jury of an innocent man, notwithstanding his murder conviction, and then, to the same factfinder, argue that if he was the principal, then the jury should be lenient because of his

difficult childhood. Schlaich was aided by the fact that the guilt trial had not been before the jury, which was an advantage, as the Maryland Court recognized. 724 A.2d at 16-17. Alternative arguments are common in the law, but there is no authority that requires that an attorney use them. Indeed, the choice between arguments, limited, perhaps by the client's express wishes, seems to be the very essence of counsel's function in any context. Cf. *Jones v. Barnes,* 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (holding that defense counsel assigned to prosecute appeal from criminal conviction does not have constitutional duty to raise every nonfrivolous issue requested by defendant).

Finally, we note that there is nothing in *Strickland* or its progeny to suggest that even if Schlaich had investigated further that he would have been required to present the evidence thus developed in addition to, or instead of his chosen strategy. On the contrary, the Supreme Court has found it reasonable to rely on other strategies during capital sentencing proceedings notwithstanding counsel's possession of other mitigating evidence, especially where that evidence is equivocal. See *Burger v. Kemp,* 483 U.S. at 792-93, 107 S. Ct. 3114 (1987) (failure to put on unhappy childhood evidence reasonable where helpfulness was in doubt); *Darden v. Wainwright,* 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (counsel's failure to put on psychiatric mitigating evidence reasonable where such evidence may have opened door to prosecution to rebut with evidence of capability to commit the crime charged). The Supreme Court has held that counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped. *Darden,* 477 U.S. at 186-87, 106 S. Ct. 2464; see also *Howard v. Moore,* 131 F.3d 399, 421 (4th Cir. 1997) (en banc). Indeed, whether a particular bit of evidence is mitigating is often "in the eye of

the beholder." *Burger v. Kemp,* 483 U.S. at 794, 107 S. Ct. 3114 (citation and internal quotation marks omitted). Likewise, in this case, not all of the available social history evidence is unequivocally mitigating. Here, the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness. See, e.g., *Barnes v. Thompson,* 58 F.3d 971, 980-1 (4th Cir. 1995) (failure to introduce evidence of childhood abuse or mental impairment not ineffective where counsel concluded evidence could have been used by jury to make finding of future dangerousness).

As we have stated, "[t]rial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case. The failure to put on such evidence, or the presentation of evidence which then backfires, may equally expose counsel to collateral charges of ineffectiveness. The best course for a federal habeas court is to credit plausible strategic judgments in the trial of a state case." *Bunch v. Thompson,* 949 F.2d 1354, 1364 (4th Cir. 1991). The district court failed to heed this admonition. Schlaich stated that he chose to focus on one theory of Wiggins' case at sentencing because the "shotgun approach" often confuses the issues and works to the detriment of the defendant. In Schlaich's professional judgment, then, avoidance of conflicting arguments supported limited investigation into social history. The Maryland Court of Appeals found his judgment sound on the basis of the factual record before it, and even if we were of opinion that the Maryland Court's decision was in error, we cannot say that it was unreasonable.

We are of opinion that the Maryland Court of Appeals' decision regarding Wiggins' ineffectiveness claim was

reasonable.[9] Therefore, we reverse the district court's grant of Wiggins' petition on this ground also.

V.

The judgment of the district court is accordingly

REVERSED.

WILKINSON, Chief Judge, concurring:

I concur in the opinion of the court. Under the AEDPA standard of review, and given the parameters of the *Jackson* and *Strickland* claims themselves, our role is a circumscribed one. Judge Widener has set forth the record evidence with admirable care, and I am satisfied that there is no basis in law or fact to overturn the judgment of the Maryland state system.

My own view is that petitioner very probably committed the heinous offense for which he stands convicted. But I cannot say with certainty that he did so.* However, it is for the Governor to determine the extent to which the lack of total certitude should inform the exercise of discretion under Md. Code Ann., Corr. Servs. § 7-601 and Md. Const. art. II, § 20. To confuse the rule of law here with the role of clemency would only do a disservice to both.

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[9] Because we find that the Maryland Court of Appeals' decision regarding ineffectiveness was reasonable, we need not address the second prong in the *Strickland* analysis.

* In addition to the strong incriminating evidence, there are also the unexplained items noted by Judge Widener--namely, the unidentified fingerprints, baseball cap, fibers, and hairs. Further, the petitioner had no prior record.

NIEMEYER, Circuit Judge, concurring:

The court's opinion in this case fully states the record evidence and persuasively demonstrates why the State court did not act unreasonably in applying *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), to deny Wiggins relief on his first claim. As an additional reason for reaching this conclusion, I would note that from the condition of Florence Lacs' apartment, a reasonable jury could find, beyond a reasonable doubt, that whoever ransacked Florence Lacs' apartment and robbed her also murdered her. Because the evidence convincingly points to the fact that Wiggins robbed Lacs on April 15 and, within hours, was using the products of this robbery, the jury could reasonably find that Wiggins also murdered Lacs. Wiggins' only explanation--that he found Lacs' Chevrolet *on September 16* with the keys, credit cards, and a diamond ring in it--is belied by the fact that Wiggins is directly linked to the car and the credit cards during the evening of *September 15.*

I find the question of whether the State court reasonably applied *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to conclude that Wiggins received adequate assistance of counsel during the sentencing phase of his trial to be a closer call. Both of my colleagues are satisfied that the decision not to introduce mitigating evidence was consistent with a strategic decision made by Wiggins' counsel not to imply any confession of guilt and to seek to have the jury hesitate on the death sentence because of a hoped-for hesitation on liability. It appears to me, however, that counsel could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence. But

in the end, this may be only a luxury of hindsight. There is support in the record from which to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue. With less confidence, therefore, I also concur in the court's opinion that the State court reasonably concluded that Wiggins was provided effective assistance of counsel during the sentencing phase of his trial.

In short, because the State court's refusal to grant relief was neither contrary to clearly established federal law, as determined by the Supreme Court, nor involved an unreasonable application of that law, *see* 28 U.S.C. § 2254(d)(1), I agree that Wiggins' petition should have been denied by the district court. Therefore, I concur in the thorough opinion prepared for the court by Judge Widener.

Appendix B

JUDGMENT

FILED: May 2, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 01-23
CA-99-2420-JFM

KEVIN WIGGINS
Petitioner - Appellee

v.

THOMAS R. CORCORAN, Warden, Maryland Correctional Adjustment Center; WILLIAM W. SONDERVAN, Commissioner of Corrections of the State of Maryland; J. JOSEPH CURRAN, JR.
Respondents - Appellants

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

Appendix C

United States District Court,
D. Maryland.

Kevin WIGGINS
v.
Thomas R. CORCORAN, Warden William Sondervan, Commissioner of Corrections J.
Joseph Curran, Jr., Attorney General, State of Maryland

No. JFM-99-2420.
Sept. 18, 2001.

Donald B. Verrilli, Jr., Washington, DC, for Kevin Wiggins.

Ann N. Bosse, J. Joseph Curran, Jr., Office of Atty. Gen., Baltimore, MD, for Thomas R. Corcoran, William Sondervan, J. Joseph Curran, Jr.

OPINION

MOTZ, District Judge.

More than twelve years ago, the body of seventy-seven year old Florence Lacs was found in the bathtub of her garden apartment. The medical examiner determined the manner of death was homicide caused by drowning. Her car and credit cards were missing but later recovered in the possession of Kevin Wiggins.

Now before this Court is a petition for writ of habeas

corpus brought under 28 U.S.C. § 2254 by Wiggins,[1] who was sentenced to death by a jury after having been found guilty of the murder of Mrs. Lacs by the Honorable J. William Hinkle in a non-jury trial. Wiggins asserts, *inter alia,* that the evidence was constitutionally insufficient to sustain his conviction and that his trial counsel was constitutionally ineffective in failing to present mitigation evidence during his sentencing proceeding. Both claims have been exhausted, and both are meritorious.[2] Therefore, Wiggins's petition will be granted.

I. *History of the Case*

On October 20, 1988, Wiggins was indicted in the Circuit Court for Baltimore County on charges of first degree murder, robbery, theft and burglary. (*See* Paper No. 3, Exhibit 2 at 1). On December 8, 1998, the State filed notice of intention to seek the death penalty. (*Id.,* Exhibit 1 at 2). Wiggins, who opted to be tried before a judge, was represented at trial and sentencing by Michelle Nethercott and Carl Schlaich. On August 4, 1989, Judge Hinkel found Wiggins guilty of first degree murder, robbery, and two counts of theft. (*Id.,* Exhibit 1 at 7-9 and Exhibit 6 at 135-140).

Wiggins elected to be sentenced by a jury. (*Id.,* Exhibit 1 at 12-13 and Exhibit 7 at 142-59). After four days of proceedings, a jury determined that he was a principal in the first degree murder of Mrs. Lacs, and that the appropriate

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[1] Questions concerning the need for expansion of the record and an evidentiary hearing, briefed by counsel in additional submissions, have been resolved. *See* Paper Nos. 18 and 19.

[2] The merits of the remaining issues raised in the petition, presented by the parties in submissions docketed as Paper Nos. 1, 3, 5, 7 and 9, are addressed herein.

penalty was death. (*Id.*, Exhibit 1 at 1 and 13 and Exhibit 12 at 66-69). Accordingly, on October 18, 1989, Judge Hinkel noted the jury's verdict and also imposed a ten year term of incarceration for robbery and concurrent eighteen month sentences for the two theft convictions. (*Id.*, Exhibit 1 at 9 and 13 and Exhibit 12 at 71-72). Those sentences have now been fully served. A motion for new trial was subsequently heard and denied. (*Id.*, Exhibit 1 at 14 and Exhibit 13).

Wiggins, through counsel,[3] argued on direct appeal to the Maryland Court of Appeals that

(1) the evidence presented at trial was insufficient to establish that he perpetrated the crimes;

(2) the trial court erred in denying his motion for new trial;

(3) the evidence presented at sentencing was insufficient to support a finding that he was a principal in the first degree;

(4) the trial court erred in excluding mitigating evidence that the State had made a plea offer of a life sentence;

(5) the trial court erred in excluding other mitigating evidence at sentencing;

(6) the trial court erred in denying petitioner's right of allocution;

(7) the trial court erred in denying his motion for a bifurcated sentencing hearing;

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[3] On direct appeal, Wiggins was represented by Julia Doyle Bernhardt and Melissa Moore.

(8) the trial court erred in admitting irrelevant evidence relating to the victim's *TV Guide* magazines;

(9) the trial court erred in admitting victim impact evidence at sentencing;

(10) the death sentence was excessive and disproportionate to the sentences imposed in similar cases, considering the nature of the crime and the defendant;

(11) the Maryland death penalty statute is unconstitutional; and

(12) the trial court erred in imposing separate sentences for the two theft convictions.

(*Id.*, Exhibit 15 at 2-3). In a reported opinion dated November 8, 1991, the appellate court affirmed all but the theft-related counts of the judgment against him. (*Id.*, Exhibit 26); *see also Wiggins v. State*, 324 Md. 551, 597 A.2d 1359 (Md. 1991). Wiggins sought *certiorari* as to one issue, to wit

> "[w]hether the exclusion of relevant mitigating evidence at petitioner's capital sentencing proceeding that the state had offered a life sentence in exchange for a plea of guilty and that the death penalty is imposed infrequently in Maryland in like cases violated the Eighth and Fourteenth Amendments."

(*Id.*, Exhibit 27 at iii). On April 27, 1992 the United States Supreme Court denied review. (*Id.*, Exhibit 29); *see also Wiggins v. State*, 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992).

In January, 1993, Wiggins sought post conviction relief in

the Baltimore County Circuit Court, raising 38 claims embodying 52 issues. After a hearing, the Honorable John F. Fader II denied relief on all grounds in a 257-page decision filed on October 22, 1997. (*Id.*, Exhibit 1 at 19 and Exhibit 40). In his petition for leave to appeal filed before the Court of Appeals, Wiggins alleged that:

(1) trial counsel provided ineffective assistance at sentencing by failing to investigate and introduce mitigating evidence concerning his traumati background and mental problems;

(2) trial counsel provided ineffective assistance at the guilt/innocence phase of trial by failing to adduce evidence of the medical examiner's prior inconsistent opinion regarding time of death;

(3) trial counsel provided ineffective assistance by failing to secure a forensic expert for trial, thus handing him the choice of going to trial without a jury or proceeding before a jury without an expert;

(4) trial counsel failed to investigate and develop evidence regarding jury selection procedures in Baltimore County;

(5) the prosecutor failed to disclose an agreement with one of its witnesses regarding lenient treatment in exchange for testimony; and

(6) the evidence was insufficient to find him guilty of first degree murder and to establish that he was a first degree principal in the murder.

(*See* Paper No. 3, Exhibits 44-46). Wiggins's request for leave to appeal was denied on February 10, 1999 in a reported

opinion. *Wiggins v. State*, 352 Md. 580, 724 A.2d 1 (Md. 1999). (*See* Paper No. 3, Exhibit 50). On *certiorari*, petitioner sought review as to whether:

(1) trial counsel in a capital case are under a Sixth Amendment duty to investigate mitigating evidence about a defendant's background and character in advance of making a "tactical" decision not to present such evidence at sentencing, and are likewise under a Sixth Amendment duty to present such mitigating evidence at sentencing if the evidence is in no respect inconsistent with counsel's "tactics" at sentencing;

(2) the Sixth Amendment right to effective assistance of counsel is denied when trial counsel fail to impeach a key state witness at trial with a prior inconsistent statement that reveals the State's theory of the case to be scientifically impossible; and

(3) the Sixth Amendment right to effective assistance of counsel is denied where trial counsel, after objecting to the composition of the sentencing jury, fail to introduce any evidence to support the objection, and in particulate fail to introduce evidence that would have shown that six out of ten African Americans residing in the jurisdiction were excluded from the jury pool.

(*See* Paper No. 3, Exhibit 51 at i). *Certiorari* was denied. *See Wiggins v. Maryland*, 528 U.S. 832, 120 S. Ct. 90, 145 L. Ed. 2d 76 (1999).

In the instant petition, his first in federal court, Wiggins asserts that:

A. he did not knowingly and voluntarily waive his right to a jury trial;

B. the evidence was not sufficient to sustain his murder conviction;

C. the trial court erred in denying his motion for new trial;

D. the prosecution failed to disclose exculpatory evidence;

E. counsel at the guilt/innocence phase of trial rendered ineffective assistance;

F. unreliable identification evidence was improperly admitted at trial;

G. the grand jury and sentencing jury were selected in a manner that violated the Sixth Amendment's fair cross-section guarantee and the Fourteenth Amendment's equal protection clause;

H. voir dire of the jurors was inadequate;

I. the trial court wrongly excused prospective jurors;

J. the evidence was insufficient to support the sentencing jury's finding of the aggravating factor of murder committed in the course of a robbery;

K. the evidence was insufficient to support the sentencing jury's finding that he was a principal in the first degree;

L. the court at sentencing erred in several of its evidentiary rulings;

M. the court erred in instructing the jury;

N. counsel at sentencing rendered ineffective assistance;

O. it is unconstitutional to impose capital punishment on a mentally retarded individual;

P. application of the death penalty in Maryland is arbitrary;

Q. the death penalty is excessive punishment in all cases; and

R. counsel on direct appeal rendered ineffective assistance.

(*See* Paper No. 1 at 11-37).

II. *Threshold Considerations*

Statute of Limitations

Respondents do not contend--and the Court does not find--that the petition is time-barred pursuant to 28 U.S.C. § 2244(d).

Exhaustion of State Remedies and Procedural Default

Before a petitioner may seek habeas relief in federal court, he must exhaust each claim presented to the federal court by pursuing remedies available in state court.[4] *See Rose v. Lundy*, 455 U.S. 509, 521, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). This exhaustion requirement is satisfied by seeking review of the claim in the highest state court with jurisdiction to consider

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[4] The claim must be fairly presented to the state courts. This means presenting both the operative facts and controlling legal principles. *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir.2000) (citations omitted).

the claim. *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); 28 U.S.C. § 2254(b) and (c). In Maryland, this may be accomplished by raising certain claims on direct appeal and with other claims by way of a post conviction proceedings. Exhaustion is not required if at the time a federal habeas corpus petition is filed the petitioner has no available state remedy. *Teague v. Lane,* 489 U.S. 288, 297-98, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *Bassette v. Thompson,* 915 F.2d 932, 937 (4th Cir. 1990).

Where a petitioner has failed to present a claim to the highest state court with jurisdiction to hear it, whether it be by failing to raise the claim in post conviction proceedings or on direct appeal or by failing to timely note an appeal, the procedural default doctrine applies.[5] *Coleman v. Thompson,* 501 U.S. 722, 749-50, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh'g denied* 501 U.S. 1277, 112 S. Ct. 27, 115 L. Ed. 2d 1109 (failure to note timely appeal); *Murray v. Carrier,* 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (failure to raise claim on direct appeal); *Murch v. Mottram,* 409 U.S. 41, 46, 93 S. Ct. 71, 34 L. Ed. 2d 194 (1972) (failure to raise claim during post conviction); *Bradley v. Davis,* 551 F. Supp. 479, 481 (D. Md. 1982) (failure to seek leave to appeal denial of post conviction relief).

Procedural default also may occur where a state court declines "to consider the merits [of a claim] on the basis of an

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[5] The procedural default doctrine applies where a state court refuses to consider the merits of a claim on procedural grounds or where procedural grounds would clearly bar consideration of the claim by a state court. *Teague,* 489 U.S. at 297-98, 109 S. Ct. 1060. It does not apply if a state court fails to apply the bar and considers the merits of a claim. *County Court of Ulster v. Allen,* 442 U.S. 140, 154, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

adequate and independent state procedural rule." *Yeatts v. Angelone,* 166 F.3d 255, 260 (4th Cir.), *cert. denied,* 526 U.S. 1095, 119 S. Ct. 1517, 143 L. Ed. 2d 668 (1999). Maryland's requirement that certain claims be presented on direct appeal, *see* Md. Ann. Code Art. 27, § 645A(c), constitutes an adequate and independent state procedural rule. *Johnson v. Smith,* 981 F. Supp. 944, 948 (D. Md. 1997).

The procedural default doctrine bar, however, is not absolute. Where a petitioner shows cause and prejudice for such default, or demonstrates actual innocence, federal habeas corpus review may be appropriate, notwithstanding default. *Murray,* 477 U.S. at 495, 106 S. Ct. 2639; *Wainwright v. Sykes,* 433 U.S. 72, 86, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

Cause for procedural default must be more than mistake or ignorance. Under some circumstances, ineffective assistance of counsel as determined under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) may be cause.[6] *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Otherwise, "in order to demonstrate 'cause' for the default [petitioner] must establish that 'some objective factor external to the defense impeded counsel's [or petitioner's] efforts' to raise the claim in state court at the appropriate time." *Breard v. Pruett,* 134 F.3d 615,

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[6] Ineffective assistance of counsel in proceedings such as post conviction, where representation by counsel is not constitutionally mandated, is not cause for a procedural default. *Coleman,* 501 U.S. at 752, 111 S. Ct. 2546. The fact that certain types of claims may only be raised in post conviction proceedings does not create a limited constitutional right to counsel in those proceedings which would permit ineffective assistance to constitute cause. *Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir. 1997), *cert. denied,* 522 U.S. 1100, 118 S. Ct. 907, 139 L. Ed. 2d 922 (1998).

620 (4th Cir. 1998) (quoting *Murray,* 477 U.S. at 488, 106 S. Ct. 2639). Ignorance of the availability of an appeal in a collateral proceeding, even when based on erroneous legal advice, is not cause for failing to file a timely appeal. *Tower v. Phillips,* 7 F.3d 206, 211 (11th Cir. 1993). In addition to showing cause, a petitioner must establish prejudice, i.e., that the errors alleged worked to his actual and substantial disadvantage and were of constitutional magnitude. *Carrier,* 477 U.S. at 492, 106 S. Ct. 2639; *Felton v. Barnett,* 912 F.2d 92 (4th Cir. 1990); *Waye v. Townley,* 871 F.2d 18 (4th Cir. 1989).

Even where a petitioner fails to show cause and prejudice for a procedural default, a court must still consider whether it should reach the merits of the petitioner's claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo,* 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *see also Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). The miscarriage of justice standard is directly linked to innocence. *Id.* at 320, 115 S. Ct. 851. Innocence is not an independent claim; rather, it is the "gateway" through which a petitioner must pass before a court may consider constitutional claims which are defaulted. *Id.* at 315, 115 S. Ct. 851. The miscarriage of justice exception applies where a petitioner shows that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 496, 106 S. Ct. 2639. In capital cases, this showing requires a petitioner to show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *Sawyer v. Whitley,* 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

Here, respondents contend that twelve of the eighteen

claims raised in the petition are procedurally defaulted, in whole or in part. (*See* Paper No. 3 at 43-46; 47-49; 52-56; 65-67; 67-69; 70-71; 75-76; 120-121; 144; 145; 146 and 147). Inasmuch as this Court has determined that the evidence was constitutionally insufficient to sustain petitioner's murder conviction and that trial counsel was ineffective in failing to present mitigation evidence at sentencing, the case law cited above mandates federal habeas corpus review of most of the twelve otherwise-defaulted claims, as further elucidated herein. *Murray,* 477 U.S. at 496, 106 S. Ct. 2639.

III. *Standard of Review*

Effective April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2254(d) to provide that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established, federal law as determined by the Supreme Court; or
>
> (2) resulted in a decision based on an unreasonable determination of the facts, in light of the evidence presented in the State court proceedings.

Under the AEDPA, federal courts no longer can correct error in state court proceedings, but must instead exercise a more limited review, set forth in 28 U.S.C. Section 2254(d)(1)

and (2) (as amended). The statute provides a new analytical framework for determining whether the state court's findings concerning a claim raised on federal habeas corpus review is correct.

Section 2254(d) now provides that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), the Supreme Court characterized Section 2254(d) as a "new, highly deferential standard for evaluating state court rulings." In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), Justice O'Connor, speaking for the majority, further elucidated that standard, stating that:

> Section 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under Section 2254(d)(1), the

> writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412, 120 S. Ct. 1495. Justice O'Connor indicated that "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *Id.* Furthermore, she indicated that:

> [u]nder Section 2254(d)(1)'s "unreasonable application clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

Id. at 411, 120 S. Ct. 1495. In other words, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly

established federal law was objectively unreasonable." *Id.* at 409, 120 S. Ct. 1495. A decision is contrary to clearly established federal law if a state court applies a rule that contradicts Supreme Court precedent or if a state court "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result." *Id.* at 405-06, 120 S. Ct. 1495.

"A state court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular . . . case . . . [qualifies] as a decision 'involving an unreasonable application . . . of clearly established Federal law.'" *Id.* at 407-08, 120 S. Ct. 1495. Also, "a state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone,* 530 U.S. 156, 166, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000).

Thus, in reviewing Wiggins's attack on his state court conviction, this Court must presume that factual determinations made by the state court are correct. Wiggins then bears the burden of rebutting this presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. Section 2254(e)(1).

IV. *Analysis of Issues Presented for Review*

Sufficiency of the Evidence (Claim B)

A.

Ms. Lacs, an elderly woman, was found drowned in the bathtub of her apartment at approximately 3:50 on the afternoon of Saturday, September 17, 1988. Testimony at trial

placed Wiggins near Lacs's apartment (perhaps in conversation with her) at approximately 5:00 on the afternoon of Thursday, September 15, 1988, when Ms. Lacs was last seen alive. Later that evening, Wiggins and his girlfriend, Geraldine Armstrong, used Lacs's credit cards and drove her car.[7] They did so again on Friday, and on Saturday they pawned a ring belonging to Ms. Lacs. Upon his arrest several days later, Wiggins falsely stated to the police that he had found Ms. Lacs's car with the credit cards and ring in it on the morning of Friday, September 16.

On its face this evidence appears compelling, and, particularly given the high degree of deference that must be given in federal habeas proceedings to the findings and rulings made by state courts, *see* 28 U.S.C. § 2254(d), it may seem surprising that I should find, as a matter of constitutional due process, that the evidence is not sufficient to sustain Wiggins's murder conviction. The governing standard of review aside, I have great respect for my state court colleagues and do not pretend to have greater acumen than they.[8] Nevertheless, I am

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[7] Aged forty-two at the time of the murder, Armstrong was fifteen years older than Wiggins. She was arrested with Wiggins and was subjected to a polygraph examination. According to the examiner, she answered dishonestly in response to questions about whether she had been in Ms. Lacs's apartment and participated in the robbery. Nevertheless, she became a witness for the State and was never prosecuted.

[8] I particularly note that though I find Judge Hinkel's thought process in finding Wiggins guilty to have been faulty, he should be commended for the honesty of his opinion. If I am correct in perceiving that Judge Hinkel deceived himself when he said that he was not relying upon any presumption arising from Wiggins's possession of the property recently stolen from Ms. Lacs, that is only because he straightforwardly set forth the reasons for his decision. Moreover, if Judge Hinkel had wanted to insulate his findings from review, he simply would have had to credit two of Wiggins's prison mates who testified that Wiggins confessed to them he had committed the

convinced that, when the record is carefully analyzed, no rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt, and that to do so involved an unreasonable application of clearly established federal law. *See Williams,* 529 U.S. at 407-408, 120 S. Ct. 1495.

I start my analysis with the evidence I have just summarized. The fact that Wiggins was observed to be near Ms. Lacs's apartment and perhaps speaking with her outside the apartment the last time she was seen alive does not itself establish that he was her murderer. Nor does the fact that Wiggins made a false exculpatory statement to the police about when he came into possession of Ms. Lacs's car, credit cards, and ring prove his involvement in the murder. Wiggins would have had equal incentive to lie about when and how he came to use Ms. Lacs's property if he had merely stolen the property without murdering Ms. Lacs.[9] Therefore, the only piece of evidence that arguably can be said to give rise to an inference that Wiggins murdered Ms. Lacs is that he possessed the

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murder. Judge Hinkel expressly declined to follow that route.

[9] It should be noted that the record reveals that this hypothesis is not wholly conjectural or entirely implausible. One of the brothers of Wiggins's girlfriend, Geraldine Armstrong, had an apartment directly under the apartment of Ms. Lacs. Further, the trial testimony disclosed that another of Armstrong's brothers was involved in an angry confrontation with Armstrong and Wiggins on the evening of Thursday, September 15. It may be that if the robbery and murder occurred late in the afternoon or early in the evening of that day, one or both of the brothers may have been involved. Or it may be that Wiggins (who the record reflects was borderline mentally retarded) pilfered Ms. Lacs's keys and credit cards on Thursday afternoon, and that one or both of the brothers later returned to her apartment with the keys (borrowed or taken from Wiggins) and, in the course of looking for more loot, committed the murder. This hypothesis would be consistent with the testimony of Edith Vassar and physical evidence from the apartment, discussed *infra*.

property stolen from her shortly after she was last seen alive.

Wiggins's conviction cannot be sustained on the basis of that inference, however, for a very simple reason. Judge Hinkel expressly stated in his oral opinion finding Wiggins guilty that "my decision is not based on any presumption, arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption." An inference not drawn, or a presumption not relied upon, by the fact-finder is not a fact.[10] Accordingly, it is necessary to consider if there was other evidence upon which a rational finder of fact could have found Wiggins guilty beyond a reasonable doubt.

Proof that Ms. Lacs had died between 5:00 p.m. on Thursday, September 15, and 7:45 that evening--when, according to trial testimony, Wiggins was first observed driving her car--would certainly have sufficed. No witness, however, was able to testify on the basis of personal knowledge when Ms. Lacs died, and the medical testimony, viewed most favorably to the State, was at best inconclusive on the point. The death certificate, completed by Dr. Margarita Korell who performed the autopsy, estimated Ms. Lacs's time of death as

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[10] In affirming Wiggins's conviction and sentence on direct appeal, the Maryland Court of Appeals relied upon the presumption, stating that "[u]nder the circumstances disclosed in the evidence, Wiggins's possession of the victim's property shortly after she was robbed and murdered support an inference that he was the perpetrator of both the robbery and the murder." *Wiggins v. State,* 324 Md. 551, 558, 597 A.2d at 1368-69 (Md.1991). The question of the constitutional sufficiency of the evidence aside, it seems to me to be a clear violation of due process of law for an appellate court, in affirming a conviction, to rely upon an inference that is only permissible and that was expressly rejected by the finder of fact.

Friday Evening, September 16, more than twenty-four hours after Wiggins is alleged to have murdered her. Dr. Gregory Kaufmann, an expert pathologist called by Wiggins at the guilt/innocence phase of trial, testified that Ms. Lacs had been dead a maximum of eighteen hours when her body was photographed at 9:00 p.m. on Saturday, September 17. At the trial, Dr. Korell testified that "what the maximum period was" between the time of Ms. Lacs' death and the autopsy could not be stated "with any degree of medical certainty or probability."[11] In his oral opinion denying Wiggins's motion for a new trial, Judge Hinkel characterized Dr. Korell's testimony as being of "little value." (*See* Paper No. 3, Exhibit 13 at 30). He also discounted Dr. Kaufmann's testimony, finding that "there's nothing certain about medical testimony of this sort" and that "all the other evidence in this case was sufficient for me." (*Id.*, Exhibit 13 at 33-34).

B.

In short, according to his own words, Judge Hinkel relied neither upon any presumption arising from Wiggins's possession of recently stolen property nor upon any medical

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[11] Prior to the trial, Dr. Korell had told Ms. Nethercott, one of Wiggins's attorneys, that "in her judgment the victim could not have been dead more than twenty-four hours from the time of the discovery of the body." Since the body was discovered at approximately 3:50 on the afternoon of Saturday, September 17, this was entirely inconsistent with the State's theory that Wiggins had murdered Ms. Lacs between 5:00 p.m. and 7:45 p.m. on Thursday, September 16. Shortly after this conversation, Dr. Korell called Ms. Nethercott back and retracted her opinion, saying that she had spoken with a superior and was changing her mind. Although these conversations were known to Judge Hinkel by virtue of oral argument on a pretrial motion, Wiggins's counsel did not cross-examine Dr. Korell about them at trial. The failure to do so constitutes one of Wiggins's ineffective assistance of counsel claims.

testimony in finding Wiggins guilty. What other evidence was there to support that verdict? Judge Hinkel recited only five other factual findings when rendering his oral opinion finding Wiggins guilty: (1) Wiggins was "there [in the area of Ms. Lacs's apartment] at a relevant time;" (2) he gave a false exculpatory statement to the police concerning when he came into possession of Ms. Lacs's stolen property; (3) he knew Ms. Lacs; (4) Mary Elgert, one of Ms. Lacs's friends, testified that Ms. Lacs, who was wearing a blue skirt when her body was discovered on Saturday, had also been wearing a blue skirt at a luncheon on Thursday afternoon; and (5) Ms. Lacs's apartment had been ransacked. As stated above, neither of the first of these findings establishes that Wiggins murdered Ms. Lacs. Likewise, the fact that Wiggins knew Ms. Lacs obviously does not prove that he killed her.

The fourth fact recited by Judge Hinkel proves little or nothing. Assuming that Ms. Lacs was wearing a blue skirt on Thursday, this does not prove that she was murdered between 5:00 p.m. and 7:45 p.m. that day. Her killer may have come into her apartment after 7:45, or she may have put the same skirt on Friday or Saturday before being murdered. Moreover, in finding that Ms. Lacs was wearing a blue skirt on Thursday, Judge Hinkel had to discount other testimony. Elizabeth Lane, another of Ms. Lacs's friends who had been with her at the Thursday luncheon, was the one who reported her missing. In her report she told the police that Ms. Lacs had been wearing a red dress at the luncheon. Similarly, Chianti Thomas, an eleven-year-old girl who prior to trial had selected Wiggins's photograph as the man she had observed conversing with Ms. Lacs outside her apartment at approximately 5:00 on Thursday

afternoon,[12] testified that Ms. Lacs had been wearing a red skirt at the time.

Of course, it is within the province of the fact-finder to determine what witnesses to credit and what witnesses to discredit. However, due process does not permit the fact-finder to reason backward from the conclusion that the defendant committed the crime, and to discredit or ignore every piece of evidence contrary to that hypothesis. As the Fourth Circuit has explained, "[t]o start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty." *Evans-Smith v. Taylor,* 19 F.3d 899, 910 (4th Cir. 1994). Judge Hinkel's unexplained selection of the testimony of Ms. Elgert over the testimony of Ms. Lane and Ms. Thomas on the question of the color of the dress or skirt Ms. Lacs was wearing on Thursday afternoon suggests that he fell into the trap cautioned against by the Fourth Circuit.

Judge Hinkel's discrediting of the testimony of Edith Vassar, another one of Ms. Lacs's friends, provides further evidence on the same point. Ms. Vassar, who also attended the Thursday luncheon, testified that she spoke with Ms. Lacs at 10:00 a.m. on the morning of Friday, September 16, to discuss their mutual plans for the day. This asserted conversation occurred after, under the State's theory of the case accepted by Judge Hinkel, Ms. Lacs had been murdered. Ms. Vassar stuck

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[12] Ms. Thomas, who was called as a witness for the State, was unable to identify Wiggins at the trial. Wiggins also points out that she testified that the man she observed left the area after speaking with Ms. Lacs and that Judge Hinkel did not address this fact in his opinion.

to her testimony despite the fact that on the eve of trial she received a telephone call from an unidentified caller who tried to persuade her that she and Ms. Lacs spoke on Thursday, not Friday. It may be that Ms. Vassar was incorrect in her recollection. In finding that her memory was faulty, however, Judge Hinkel gave no reason other than to say that "all of the other evidence in this case is so overwhelming that it [what Ms. Vassar testified to] is not so." As I have discussed, it is only if one starts from the premise that Wiggins was guilty that the other evidence of his guilt appears overwhelming.

C.

Let me now turn to the issue of the ransacking of Ms. Lacs's apartment--the fifth factual finding Judge Hinkel alluded to in his oral opinion finding Wiggins guilty. To say that this fact proves that Wiggins was guilty begs the question. In order to reach that conclusion, one would have to find that Wiggins was the person who did the ransacking. There was, however, no evidence that he did so, other than an inference to be drawn from the fact that he possessed Ms. Lacs's stolen property--the inference that Judge Hinkel expressly stated he chose not to draw. Further, there was also evidence that Judge Hinkel did not address tending to show that Wiggins had not ransacked the apartment and, indeed, had not been involved in a struggle with Ms. Lacs. First, Wiggins's fingerprints were not found in the apartment, and unidentified fingerprints were found. Second, a Ryder baseball cap was recovered from the apartment, and no evidence was presented tying the cap to Wiggins. For example, neither Chianti Thomas nor Robert Weinberg, a contractor for whom Wiggins was working at the apartment complex where Ms. Lacs resided, testified that they had seen Wiggins wearing a baseball cap. Third, Wiggins had been painting all day on Thursday, September 15, and there was testimony from a

witness for the State that he had to wash paint off when he arrived at his girlfriend's house that evening. No paint was found in Ms. Lacs's apartment. Fourth, Mr. Weinberg, upon whose testimony the State relied to establish that Wiggins was near Ms. Lacs's apartment at approximately 5:00 p.m. in the afternoon on September 15, testified that Wiggins returned approximately twenty minutes after having been released from work to say that he had moved some sheetrock. Weinberg further testified that Wiggins in fact had moved the sheetrock and that although this would have taken him only a few minutes, it was an approximately five minutes' walk each way from Weinberg's office to the place near Ms. Lacs's apartment where the sheetrock was located. This time sequence would not realistically have given Wiggins time to struggle with Ms. Lacs, run water in her bathtub and murder her, and ransack her apartment. Moreover, Weinberg did not testify that Wiggins was in any unusual emotion state when he returned to the office, as would have been likely if he had just committed a murder.

Ineffective Assistance of Counsel at Sentencing (Claim N)

The other claim I find meritorious is that Wiggins's trial counsel was ineffective during the sentencing proceeding in failing to develop a mitigation case. The Maryland courts' decisions that counsel was not ineffective involved an unreasonable application of clearly established federal law. Indeed, it is almost directly contrary to the Supreme Court's recent decision in *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). There, the Court held that a defendant has "a right--indeed, a constitutionally protected right--to provide the jury with . . . mitigating evidence" and that defense counsel's failure to present such evidence fell short of prevailing professional standards. *Id.* at 393-96, 120 S. Ct.

1495. The Court also found that under the facts of the case the "prejudice" prong of the test established by *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) was met.[13] 529 U.S. at 396-98, 120 S. Ct. 1495. Wiggins's mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams.* Therefore, it follows *a fortiori* that Wiggins was prejudiced by his counsels' unprofessional errors.

The State seeks to justify trial counsels' decision as a tactical one. That contention, which was accepted by the Maryland courts, is based upon the testimony of trial counsel during the post-conviction hearing that they made the decision to "retry guilt" before the sentencing jury and that they did not want to dilute the effectiveness of their argument by presenting a mitigation case as well. (*See* Paper No. 3, Exhibit 35 at 27, 54-56). In fact, it appears that defense counsels' "tactical decision" was forced upon them by inattention and lack of

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[13] The well-established standard for proving an ineffective assistance of counsel claim requires petitioner to show that "counsel's representation fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). With regard to the first prong of this test, this Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S. Ct. 2052. All circumstances are to be considered, and this Court's scrutiny of counsel's conduct must be "highly deferential." *Id.* at 688-89, 104 S. Ct. 2052. Furthermore, even if counsel committed a professionally unreasonable error, relief can be granted only if "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

preparation. Before the trial, lead counsel had taken a new full-time job in another county, spent only "a day a week or so" attending to his former responsibilities, and left it to his co-counsel to do "most of the work." (*Id.*, Exhibit 35 at 12-16, 40, 100). *See, e.g., Rose v. State,* 675 So. 2d 567, 572 (Fla. 1996) (finding a failure to investigate where, *inter alia,* counsel had been pressed for time because he had gotten married and gone on a ten-day honeymoon during the period prior to sentencing). Here, the attorney left in charge had previously worked on only one or two felony jury trials, had never before worked on a capital trial, and was "frankly overwhelmed" as the trial date approached. (*See* Paper No. 3, Exhibit 35 at 81-84, 100). Each of the defense attorneys testified that the other was responsible for preparing the mitigation case.[14] (*Id.*, Exhibit 35 at 27, 40, 112-113). *See Bean v. Calderon,* 163 F.3d 1073, 1079 (9th Cir. 1998) (where failure to develop mitigating evidence resulted from counsel's "role confusion," that failure "can only be characterized as a deficiency in trial preparation, not a strategic decision"); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir. 1989) (holding that failure to investigate was due to "neglect" where "[e]ach lawyer testified that he believed that the other was responsible for preparing the penalty phase . . . ").

In any event, in order for a tactical decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation. *See, e.g., Stouffer v. Reynolds,* 168 F.3d 1155, 1167 (10th Cir. 1999) ("In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed") (citations omitted); *Jackson v. Herring,* 42 F.3d 1350, 1367-68 (11th Cir. 1995) (decision to forego a mitigation presentation cannot be reasonable if it is

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[14] Neither the state post-conviction court nor the Maryland Court of Appeals addressed the "role confusion" issue in their opinions.

supported by insufficient investigation). Wiggins's trial counsel conducted no such investigation. It is true that when making their decision solely to "retry guilt," counsel were aware of some mitigating information about Wiggins's unfortunate upbringing. (*See* Paper No. 3, Exhibit 35 at 33-34). However, their very possession of that information triggered their obligation to conduct a more complete investigation.[15] *See, e.g., Lockett v. Anderson,* 230 F.3d 695, 712-14 (5th Cir. 2000) (finding a failure to investigate where counsel had notice of the defendant's possible psychological problems but failed to conduct further inquiry); *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994); *cf. Williams,* 529 U.S. at 396, 120 S. Ct. 1495 (noting that counsel failed to return a phone call of an accountant who offered to testify as to the defendant's positive experience in a prison ministry program). It did not excuse them of their duty at least to make a fully informed and deliberate decision on the question of whether to present a mitigation case.

Trial counsel were aware that it was a routine practice in the Maryland Public Defender's Office to retain an expert forensic worker to prepare a social history of capital defendants and that funds were available for that purpose. (*See* Paper No. 3, Exhibit 35 at 29-30, 32-33; Exhibit 36 at 33-34). If they had

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[15] Even a cursory review of the DSS records provides information that Wiggins possessed "borderline intelligence" and in fact may have been mentally retarded. As discussed *infra,* at the time of trial, the Supreme Court had held that mental retardation was a mitigator to be considered in capital cases. *See Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("*Penry I*"). As noted in *Penry,* 492 U.S. at 334, 109 S. Ct. 2934, Maryland on July 1, 1989 became the second state to statutorily mandate that the mentally retarded not be subjected to capital punishment in some circumstances *Penry* was decided--and Maryland's statute took effect--prior to Wiggins's trial.

caused such a history to be prepared, they would have learned information that was far more extensive and detailed than the information they possessed when they made their tactical decision not to present a mitigation case.[16] Post-conviction counsel did have a social history prepared and, as a result, learned many crucial facts, including the following:

. As an infant, Wiggins and his siblings were routinely left alone and unfed for days at a time. (*See* Social History of Kevin Eugene Wiggins, Ex. Mem. Supp. Pt. for Habeas Corpus at 2-4).

. As a toddler, Wiggins witnessed one of his sisters routinely being sexually abused by an adult male friend of his mother. *Id.* at 6-7.

. At age 6, Wiggins was intentionally burned by his own mother on a hot stove as punishment for playing with matches. *Id.* at 5-6.

. Wiggins was physically abused by his first foster family and, from the age of 8 on, was sexually abused for many years by his second foster father. *Id.* at 9-12.

. Wiggins was raped by the teenaged sons of his fourth foster family. *Id.* at 20-21.

. At age 16, Wiggins was molested by his Job Corp

[16] In its opinion, the Maryland Court of Appeals made the erroneous assumption that much of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel.

Supervisor. *Id.* at 22- 23.

Clearly, this information "might well have influenced the jury's appraisal of . . . [Wiggins's] moral culpability." *Williams*, 529 U.S. at 398, 120 S. Ct. 1495. Thus, particularly since Wiggins had no prior criminal record, a tactical decision made by trial counsel in possession of this information not to present a mitigation case would have been virtually inexplicable.[17] In any event, Wiggins's trial counsel were under a duty to obtain the information necessary to make a reasoned decision and their failure to do so deprived him of effective assistance of counsel.

Involuntary Waiver of Right to Trial by Jury (Claim A)

The Sixth Amendment protection that provides that the accused may elect the right to trial by an impartial jury[18] is made applicable to the states by the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 154-55, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In arguing that he invalidly waived his Sixth Amendment right, Wiggins also invokes the Fifth Amendment, contending that his waiver of a jury trial at

[17] The absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation of evidence about Wiggins's background would have been detrimental to him in terms of "future dangerousness," (*see* Paper No. 3, Exhibit 35 at 58, 127- 28), one of the factors the jury was called upon to consider during the sentencing proceeding. Moreover, it would appear that mitigating information would Wiggins's vulnerability and limited intelligence would not have been strategically inconsistent with "retrying guilt" during the sentencing phase. Indeed, it would seem that skillful counsel would have been able to mesh these facts into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder. *See* footnote 9, *supra*.

[18] *See also* U.S. Constitution Art. III, § 2 (trial of all crimes except impeachment shall be by jury).

the guilt/innocence stage of the proceedings was not knowing and voluntary because, at the time such election was required to be made, counsel had not arranged for an expert witness to be present at trial. Wiggins claims that the expert witness, who would testify concerning the victim's time of death, could not be present at the time set for trial, thus prompting counsel to pressure him to forego his right to proceed before a jury of his peers. (*See* Paper No. 1 at 11). Respondents contend that with one exception, Wiggins is procedurally defaulted from presenting all aspects of the waiver issue for federal habeas corpus review. (*See* Paper No. 3 at 42-43). They further contend that the undefaulted portion of his claim is without merit. (*Id.* at 46-47).

The issue of invalid waiver of the right to trial by jury first surfaced on post conviction. In that petition, Wiggins complained that (a) his waiver of a jury trial was coerced; and (b) counsel rendered ineffective assistance by pressuring him to waive trial by jury. (*See* Paper No. 3, Exhibit 30 at 10-11 and 17 and Exhibit 33 at 12-13 and 18). The post conviction court found, based on the record and testimony, that "coercion" did not occur: instead, Wiggins had

> ". . . listened to his trial counsel and their analysis of the situation of whether to take a judge or jury trial. Race, the heinous nature of the crime, and in the words of [Wiggins], his belief prejudice may have had an effect at the guilt/innocence phase, all played a part in making the decision to be tried by a judge. It was a decision made on the practicalities of the situation at the time."

(*Id.*, Exhibit 40 at 34). The post conviction court also found that "[m]any factors were involved in that decision, one of which was the possibility that an expert witness might not be

available at trial to give testimony on the all important topic of time of death." (*Id.*). Noting that Wiggins stated his reasons for electing to waive a jury at the guilt/innocence phase,[19] the post conviction court found no evidence that coercion by counsel led to Wiggins's decision to forego trial by jury at the first stage of trial. The post conviction court also found, based on testimony by trial counsel, that while the forensic pathologist enlisted by the defense might not have been available on certain dates, the pathologist would have been available to testify, and in fact did testify at trial. (*Id.*, Exhibit 35 at 24). The post conviction court accordingly rejected both aspects of Wiggins's involuntary waiver claim. (*Id.*, Exhibit 40 at 28-35 and 48-74).

On appeal from the denial of post conviction relief, Wiggins abandoned his "coercion" claim. Although it is not clear from the parties' appellate briefs, the Maryland Court of Appeals found that petitioner did preserve an "offshoot" of the waiver claim, by contending that the choice to forego trial by jury, even if voluntarily made, was forced on him through the incompetence of counsel. (*Id.*, Exhibit 50, *Wiggins v. State*, 352 Md. at 606, 724 A.2d 1). As noted by the Court of Appeals,

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[19] The record of August 1, 1989 reveals the following colloquy:
[Wiggins]: My decision is to go with a judge because I have the death penalty over my head, and I feel as though the people that agree to the death penalty are more likely to go with the State, and I feel as though, you know, that's a prejudice in that area.
[The Court]: I understand then that you are giving up your right to a jury trial.
[Wiggins]: Yes, sir.
[The Court]: For this phase of the proceeding?
[Wiggins]: Yes, I am.
(*Id.*, Exhibit 3 at 15). It is apparent that Wiggins made this choice after considering various factors presented to him by trial counsel. (*Id.*, Exhibit 35 at 47-51).

the allegation

> . . . seems to rest on this statement from [Wiggins's post conviction] expert, Mr. Fisher:
>
> > "If indeed what was the reason for waiving was simply this whole problem with getting their experts available and being able to go forward, that I think falls below the standards of adequate professional conduct. . . .But they had alternatives to that. They could have sought a continuance; they could have done a number of things that would have taken the dilemma which had been created and set it aside. But they didn't do that. So if that was the motivating factor or the primary motivating factor in their decision to go judge versus jury then I think that that falls below the standards of competent assistance of counsel."

It does not appear that Mr. Fisher, or anyone else, has faulted counsel for the decision of Dr. Breitenecker not to testify, or for their decision to retain Dr. Kauffman, who gave very favorable testimony for appellant. As Fisher did not specify what other "number of things" counsel could have done, it seems that his criticism lies in their failure to seek a postponement of trial rather than recommend that appellant proceed with a court trial. As [the post conviction court] noted, however, appellant made clear, when questioned about his choice to proceed non-jury, that it was not based on the availability of Dr. Kauffman or anyone else, but rather on his concern that a jury might be "more likely to go with the State." Other than post-conviction after-thought, there is nothing in the record to support the claim that counsel were deficient in their selection of experts or to require a conclusion that they improperly induced appellant into waiving a jury trial.

(*Id.*, Exhibit 50, 352 Md. at 605-607, 724 A.2d 1).

Given this record, it appears that Wiggins has defaulted on that portion of his jury waiver claim alleging coercion, and that in any event, coercion was not employed to induce his waiver. The remaining aspect of the jury waiver claim--that trial counsel acted unprofessionally and rendered ineffective assistance by recommending waiver rather than seek a postponement due to the unavailability of an expert witness--was found by the post conviction court and the Maryland Court of Appeals to be without merit, based on the record and on controlling legal precedent.

An ineffective assistance of counsel claim is a mixed question of law and fact. *Strickland,* 466 U.S. at 698, 104 S. Ct. 2052. Under the amendment to 28 U.S.C. Section 2254(d), this Court cannot grant relief on this ground as long as the state court denied the ineffective assistance of counsel claim based upon a reasonable application of the *Strickland* standard to the facts presented during the state court proceedings. As set forth above, after careful review of the record, it appears that the post conviction court and the appellate court that reviewed the post conviction decision reasonably applied the facts of the case to the *Strickland* standard in reviewing the ineffective assistance of counsel aspect of petitioner's jury waiver claim. The decisions reached by those courts do not reflect an unreasonable application of clearly established federal law, nor are they based on an unreasonable determination of the facts in light of evidence presented in those State court proceedings. Accordingly, petitioner is not entitled to relief on his claim of improper waiver of his right to trial by jury, pursuant to 28 U.S.C. § 2254(d).

Trial Court Error in Denying Motion for New Trial
(Claim C)

Wiggins asserts that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the trial court denied his motion for a new trial on the basis of the state medical examiner's change in testimony during sentencing proceedings. (*See* Paper No. 1 at 16). Assuming, without deciding, that the denial of a new trial impinges upon a fundamental right,[20] I find meritorious respondents' contention that this claim is procedurally defaulted and thus barred from federal habeas review.[21] Inasmuch as Judge Hinkel did not rely upon the medical examiner's testimony in reaching his conclusions (*see* Paper No. 3, Exhibit 13 at 30, 33-34), it is unlikely that Wiggins was prejudiced as a result of Judge Hinkel's failure to grant a new trial. Relief will not be granted on this claim.

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[20] In *Herrera v. Collins*, 506 U.S. 390, 414, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Supreme Court acknowledged that the Constitution does not itself contain mention of the right to a new trial. The Court then noted that even if the denial of a new trial can be said to implicate the Constitution, such would seemingly occur only where it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 407-08, 113 S. Ct. 853, *quoting Medina v. California*, 505 U.S. 437, 445-46, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), *quoting in turn Patterson v. New York*. 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[21] On direct appeal, Wiggins relied on Maryland Rule 4-331 to support his argument that the trial court erred in failing to grant him a new trial. *See* Paper No. 3, Exhibit 15 at 34-38. He first invoked his constitutional bases to support his argument on post conviction (*Id.*, Exhibit 30 at 14-16). The post conviction court declined to consider the constitutional aspects of the new trial claim because the claim had been raised generally on appeal. *Id.*, Exhibit 40 at 38-41. Wiggins did not challenge this ruling when appealing denial of post conviction relief. *Id.*, Exhibit 44-46 and 50.

Prosecutor's Failure to Disclose Exculpatory Evidence
(Claim D)

Wiggins next contends that the State failed to disclose exculpatory evidence in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (*See* Paper No. 1 at 17-18). To support his claim, Wiggins points to the fact that identical charges against Geraldine Armstrong (arrested with Wiggins in Mrs. Lacs's car several days after the murder) were dropped, and Armstrong testified against him at trial. From this fact, he proffers, based "on information and belief," that one of Armstrong's brothers lived in an apartment directly beneath the victim at the time of the murder, and that another of Armstrong's brothers visited with his brother at the brother's apartment the evening of the murder. He then asks this Court to accept additional proffers, again based "on information and belief," that Geraldine Armstrong received favorable treatment from the state in exchange for her testimony against him at trial; that the role of Armstrong's brothers in the murder was not investigated or pursued by the State as a result of Armstrong's agreement to testify; that the State did not disclose to petitioner prior to trial that Armstrong had been given such favorable treatment; and that the State did not disclose the possibility that Armstrong or her brothers might be responsible for the murder. (*See* Petition at 18). As found by the post conviction court[22] and noted in this Court's March 9, 2001 Memorandum and Order, Wiggins has been unable to provide factual support for any of these suppositions. Accordingly, the state court findings must be upheld, pursuant to 2254(d).

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[22] *See* Paper No. 3, Exhibit 40 at 40 at 42-44 and 256-57; *see also* Exhibit 35 at 72-77; Exhibit 36 at 28-129; Exhibit 37 at 20; Exhibit 39 at 5-10.

Ineffective Assistance of Counsel at Trial (Claim E)

Wiggins alleges that counsel was ineffective at the guilt/innocence stage of trial, based on counsel's failure to (1) introduce evidence that Medical Examiner Korell changed her opinion respecting the victim's time of death; and (2) ensure that as of the time Wiggins had to elect whether to be tried by a judge or a jury, a defense expert would be available to testify concerning time of death. (*See* Paper No. 1 at 19-21).

As previously noted, in order to prevail on a Sixth Amendment claim of ineffective assistance, Wiggins must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the results of the trial would have been different. *Strickland,* 466 U.S. at 688, 694, 104 S. Ct. 2052. The Court of Appeals found

> . . . neither a Constitutional deficiency nor Constitutional prejudice in counsel's failure to cross-examine Dr. Korell (at trial or at the sentencing proceeding) or in the decision not to have Ms. Nethercott testify with regard to her conversation with Dr. Korell. Taking the second matter first, there is absolutely nothing in this record suggesting any need for Ms. Nethercott to have testified. There is no indication whatever that, had Dr. Korell been asked about the two conversations with Ms. Nethercott, or about her conversation with Dr. Dixon, she would have denied either the fact or the content of those conversations. Ms. Nethercott's concern in that regard has utterly no foundation and should never have been a factor in deciding whether to question Dr. Korell about the matter.
>
> The question of whether Dr. Korell should have been cross-examined about her initial view and her change of opinion

> must be examined in context. Several considerations are relevant. Viewing the matter at the time of trial, it is clear that Judge Hinkel was fully aware of what had occurred. Without contradiction by the prosecutor, Mr. Schlaich had informed the judge at the hearing on the pre-trial motion to dismiss or narrow the indictment of the various conversations with Dr. Korell, and Ms. Nethercott reminded Judge Hinkel of that situation in her opening statement at trial. When Dr. Korell testified at trial, she gave a range of from 24 to 48 hours, but said that it was all guesswork and that a time of death could not be pinpointed. In Ms. Nethercott's uncontradicted view, Dr. Korell was not an effective witness; she did not make a good presentation.
>
> More significant, perhaps, is the fact that Dr. Korell's trial testimony, giving a guesswork range of 24 to 48 hours, still put the earliest time of death at 9:00 Thursday evening--at least two hours after appellant was in possession of the victim's car, credit cards, and ring. Although that testimony was neither as firm nor as favorable to appellant as Dr. Korell's initial view, it still was more exculpatory than inculpatory. Both at the time of trial and at the time of the sentencing proceeding (1989), the law in Maryland was that a prior inconsistent statement by a witness, other than a party, was admissible only to impeach the witness's credibility, and not as substantive evidence. [Citations omitted]. Not until *Nance v. State,* 331 Md. 549, 629 A.2d 633 (1993) was that rule relaxed to permit an inconsistent statement to be admitted as substantive evidence if the statement was reduced to writing and either signed or otherwise adopted by the witness. Thus, Dr. Korell's initial view, expressed orally to Ms. Nethercott, that Ms. Lacs had died no earlier than late afternoon on Friday could not have been used as substantive evidence as to time of death but only to impeach the

credibility of her testimony that (1) death could have occurred 24 hours earlier, but (2) there was no sure way to tell. To have attempted to impeach that testimony by cross-examining her about her initial view would have permitted Dr. Korell to describe her conversation with Dr. Dixon, to have acknowledged that she was wrong in her initial view, and to have explained why she was wrong. It would have placed before Judge Hinkel no information of which he was not already aware, but may have allowed Dr. Korell to strengthen her resolve about the 48 hours, which would have created an even more dramatic conflict with Dr. Kauffman's opinion.

In announcing his verdict and in denying the motion for new trial, Judge Hinkel said that he placed no weight on the medical testimony as to time of death.[1] We cannot imagine what additional benefit, as a practical matter, would have accrued to appellant from further impeachment of Dr. Korell. Failure to press the point already known to Judge Hinkel does

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[1] Appellant contends that, had evidence of Dr. Korell's initial opinion been before Judge Hinkel, he might not have disregarded Dr. Kauffman's view that death occurred on Saturday, September 17. To a large extent, that assumes that Dr. Korell's initial opinion could have been used as substantive evidence for the proposition that it is possible to determine more precisely a time of death, which, as noted, is not the case. Moreover, it is clear from his remarks that Judge Hinkel was not relying on the more abstract question of whether it was possible to establish a time of death; he left in evidence that Dr. Korell could not, herself, testify, within a reasonable degree of medical certainty, the earliest time of death and simply did not credit Dr. Kauffman's opinion that death occurred on Saturday, September 17. Discrediting Dr. Korell's testimony regarding her inability to determine more precisely a time of death would not have enhanced the credibility of Dr. Kauffman's opinion.

not, in our view, overcome the presumption of sound trial strategy; nor can we conclude that, as a result of the omission, "the result of the proceeding was fundamentally unfair or unreliable."

(*See* Paper No. 3, Exhibit 50; 352 Md. at 603-05, 724 A.2d at 12- 14). I agree with the appellate court's determination that counsel's performance was not unconstitutionally deficient with regard to the cross-examination of the medical examiner, and that prejudice did not result, since in any event, Judge Hinkel did not rely upon either expert's testimony concerning time of death in rendering his decision as to Wiggins's guilt. Neither prong of *Strickland* has been satisfied, and thus the appellate court's findings must be upheld as a reasonable application of law and fact.

The issue concerning whether a defense expert was available to testify concerning time of death has been fully examined in Claim A above, and will not be reexamined here.

Use of Unreliable Identification Evidence at Trial
(Claim F)

Petitioner next claims that twelve-year-old Chianti Thomas's pretrial identification of him was violative of Fifth, Sixth, Eighth and Fourteen Amendments, because it was obtained through the use of impermissibly suggestive police procedures that created a substantial risk of erroneous identification. (*See* Paper No. 1 at 22).

The Due Process Clause protects suspects against identification procedures which are impermissibly suggestive and conducive to irreparably mistaken identifications. *See Manson v. Brathwaite,* 432 U.S. 98, 113, 97 S. Ct. 2243, 53 L.

Ed. 2d 140 (1977); *Neil v. Biggers,* 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *Stovall v. Denno,* 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). To succeed on a due process claim, petitioner must first prove that the identification procedure was impermissibly suggestive. If impermissible suggestiveness is shown, the court must then analyze whether the identification nevertheless was reliable under the totality of the circumstances. *Manson,* 432 U.S. at 114-117, 97 S. Ct. 2243; *United States v. Dorta,* 783 F.2d 1179, 1183 (4th Cir.) (identification reliable even if pretrial photo display impermissibly suggestive where witness had several previous encounters with suspect). This standard is used whether the identification is based on a "show up" or, as here, based on photographs. *See Simmons v. United States,* 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *Harker v. Maryland,* 800 F.2d 437, 444 (4th Cir. 1986).

Although the subject of a pretrial motion, Chianti Thomas's allegedly tainted pretrial identification of Wiggins was not raised on direct appeal. (*See* Paper No. 3, Exhibits 15, 16 and 26). The post conviction court held that the claim was waived, but nonetheless reviewed it on the merits, finding no due process violation under state case law.[23] (*Id.,* Exhibit 40 at 44-48). Petitioner then abandoned his claim, failing to raise it in his appellate attack on the post conviction court's decision. (*Id.* Exhibits 44-46 and 50). This failure to present the pretrial identification claim to the Court of Appeals when challenging the denial of post conviction relief precludes this Court from further consideration of the claim, based upon the procedural

[23] *See Sallie v. State,* 24 Md. App. 468, 473, 332 A.2d 316 (1975); *Smith and Samuels v. State,* 6 Md. App. 59, 250 A.2d 285, 289 (1969). The reasoning set forth in the state cases appears to parallel that later set forth by the Supreme Court in *Manson.*

default doctrine discussed above.

Impropriety in Selecting the Grand Jury and Sentencing Jury
(Claim G)

Wiggins asserts that at sentencing he was denied his right to trial by an impartial jury of his peers. He claims that the grand jury that indicted him and the petit jury that sentenced him were selected in a manner that violated the Fourteenth Amendment's Equal Protection Clause, thereby depriving him of a jury representing a fair cross-section of the community due to the systematic exclusion of racial minorities and other distinct groups of persons. (*See* Paper No. 1 at 22). Respondents argue that this claim is procedurally defaulted and otherwise without merit. (*See* Paper No. 3 at 67- 69).

Under state law, Wiggins was entitled to a jury at his capital sentencing proceedings.[24] Prior to jury selection, Wiggins through counsel challenged the array of prospective jurors, noting that of the 104 venire persons, only three were African American.[25] (*See* Paper No. 3, Exhibit 8 at 11-12) Counsel did not present any evidence to support his contention that the percentage was due to systematic exclusion of African Americans from the panel, and the challenge to the array was denied. (*Id.*). No claim concerning the composition of the array was presented on direct appeal.

On post conviction, Wiggins argued that the manner in

[24] *See* Md. Code Ann., Art. 27, § 413(b) (1996 Repl. Vol.); *Bruce v. State,* 328 Md. 594, 599, 616 A.2d 392, 395 (1992).

[25] According to counsel, at the time Wiggins was tried, the percentage of African Americans in Baltimore County was roughly 13% of the population. *Id,* Exhibit 8 at 11-12.

which Baltimore County selects grand jurors and petit jurors--to wit, through the use of voter registration lists--was improper. He further contended that trial counsel was ineffective in failing to develop evidence to support a challenge to the array of jurors. (*Id.*, Exhibit 30 at 17-19 and 35-36 and Exhibit 33 at 22-23). The post conviction court heard evidence concerning the process for juror selection in Baltimore County and trial counsel's allegedly deficient performance with regard to the jury challenge, and rejected both claims. (*Id.*, Exhibit 40 at 102-137). In appealing that decision, Wiggins abandoned his claim that the County's jury selection process systematically excluded African Americans, and pursued only the ineffective assistance portion of the jury composition claim. (*Id.*, Exhibit 44 at 46-48 and Exhibit 50, 352 Md. at 607-08, 724 A.2d at 15). Wiggins has defaulted on the portion of the juror array issue presented here. He has failed to show cause for the default, and prejudice cannot be inferred, inasmuch as the use of voter registration lists for selection of juror pools passes constitutional muster. *See Truesdale v. Moore,* 142 F.3d 749, 755-56 (4th Cir.), *cert. denied,* 525 U.S. 951, 119 S. Ct. 380, 142 L. Ed. 2d 314 (1998).

Inadequate Voir Dire of Prospective Jurors (Claim H)

Similarly, Wiggins has defaulted on his claim that he was denied his right to adequate voir dire in order to delve into the racial attitudes of prospective jurors, as well as ascertain the prospect of bias resulting from their status as prior victims of crime; their possible bias in favor of law enforcement personnel; and their ability to evaluate and respond to mitigating evidence. (*See* Paper No. 1 at 24). Wiggins's contention of inadequate voir dire of prospective jurors was not raised on direct appeal, but instead was presented unsuccessfully at post conviction. (*See* Paper No. 3, Exhibit 30 at 20-24 and Exhibit 40 at 137-66). Wiggins did not seek to

appeal the post conviction court's determination of the voir dire issues. (*Id.*, Exhibits 44, 46 and 50). Neither cause for abandoning these issues, nor prejudice resulting therefrom, has been demonstrated, and accordingly review of the process by which prospective jurors were screened is barred under the procedural default doctrine.

Trial Court Error in Excusing Prospective Jurors
(Claim I)

Wiggins's next claim concerns prospective jurors whose excusal he claims violated his Constitutional rights. Again citing the Fifth, Sixth, Eighth and Fourteenth Amendments, Wiggins contends that these jurors should not have been excused, because they "did not sufficiently express during voir dire that their personal feelings against the death penalty were sufficiently strong to prevent them from following the law and performing their duty" if chosen for the jury. (*See* Paper No. 1 at 25). As noted by respondents, this claim also is barred from consideration under the procedural default doctrine.

Wiggins did not present this claim on direct appeal. The post conviction court denied relief (*see* Paper No. 3, Exhibit 40 at 166-78), and petitioner did not pursue the claim on appeal from that decision. (*Id.*, Exhibits 44-46 and 50). Petitioner has not shown cause and prejudice sufficient to overcome his default with regard to this issue.

Insufficiency of the Evidence by which the Sentencing Jury Found an Aggravating Factor (Claim J) and
Insufficiency of the Evidence by which the Sentencing Jury Found First Degree Principalship (Claim K)

Based on my previous finding that the evidence was

constitutionally insufficient to sustain Wiggins's conviction, these claims have been rendered moot and need not be decided here.

Erroneous Evidentiary Rulings at the Sentencing Phase
(Claim L)

Wiggins next asserts that the trial court improperly excluded relevant mitigating evidence, and admitted other evidence that was irrelevant and highly prejudicial. He claims that evidence that the prosecution had offered him a plea bargain in which he would have received a life sentence; evidence that other defendants convicted of murder under similar circumstances had not received the death penalty, and that the death penalty would be disproportionate as applied to him; and evidence showing that the death penalty is not imposed with any frequency in Maryland in like circumstances was improperly excluded. He further contends that other evidence was improperly admitted, including the testimony of a police officer with regard to *TV Guide* magazines found in the victim's apartment and testimony of the victim's friend who commented on the victim's personality. (*See* Paper No. 1 at 28). Respondents' argument to the contrary, it appears that Wiggins properly presented these evidentiary claims in the state courts, thus requiring this Court to examine each of the claims here.

Wiggins first contends that the evidence of the State's offer of a plea in exchange for a life sentence should have been presented to the jury as mitigating evidence, and was erroneously excluded by the trial court. The Maryland Court of Appeals examined this claim and found that:

> [p]rior to sentencing, the State moved *in limine* to exclude

> evidence of its offer of a life sentence in exchange for a guilty plea. Wiggins had indicated an intention to introduce evidence of this offer during the sentencing hearing. The court ruled that while the offer, if admitted in evidence, would "mitigate [] in favor of the defendant," it was not admissible before the sentencing authority as it would seriously cripple the plea negotiation process in capital sentencing prosecutions.
>
> Wiggins argues that the State's plea offer was properly admissible as mitigating evidence because, under *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the sentencing authority in capital cases must be permitted to consider any relevant mitigating factor, i.e., anything that might serve as a basis for a sentence less than death. Specifically, Wiggins says that the State's offer, for whatever reason it was made, demonstrated its belief that a life sentence was appropriate in the case and had this been known to the sentencing jury it would not have imposed the death sentence.
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> In *Lockett*, 438 U.S. at 605, 98 S. Ct. 2954...the Supreme Court held that
>
> > "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."
>
> (Emphasis in original: footnotes omitted.) Nothing in *Lockett*, the Court said, "limits the traditional authority of the court to exclude, as irrelevant, evidence not bearing on the

defendant's character, prior record, or the circumstances of his offense". *Id.* at 605, n.12, 98 S. Ct. 2954 . . . quoted in *Johnson, supra.*, 303 Md. at 527-28, 495 A.2d 1.

We have said that the appropriateness of sentences other than death may be considered by the sentencer as a mitigating circumstance in a capital prosecution. *See Hunt v. State,* 321 Md. 387, 404, 583 A.2d 218 (1990); *Doering v. State,* 313 Md. 384, 545 A.2d 1281 (1988); *Harris v. State,* 312 Md. 225, 539 A.2d 637 (1988). In *Hunt,* the defendant did not seek timely admission of evidence of his sentence for a handgun offense, and his request to reopen his case to offer it was denied by the trial judge. We held that the evidence would have been admissible in Hunt's case-in-chief, as evidence that "would aid the jury in assessing the legal and practical effect of a sentence less than death," 321 Md. at 404, 583 A.2d 218, but that the trial judge did not abuse his discretion in denying the request to reopen. In *Harris,* we held that evidence of the sentences imposed on the defendant for a related robbery offense, where the robbery was the statutory aggravating factor in a capital sentencing proceeding, was admissible. We reasoned that the sentencer might consider, as a mitigating factor, the fact that the defendant had already been appropriately sentenced for that crime. In *Doering,* we held that a defendant in a capital sentencing proceeding may introduce relevant and competent information regarding his eligibility for parole in the event a life sentence is imposed. We explained that the sentencer, in seeking to determine the appropriateness of a life sentence, would be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence may be considered as a relevant mitigating circumstance. *Doering,* 313 Md. at 412, 545 A.2d 1281. In these three cases, the factors with the

potential to mitigate were related to the actual amount of time the defendant was likely to spend in prison in the event the jury elected to impose a life sentence; consequently, they constituted relevant information for the jury to consider in determining the appropriate disposition.

Evidence of a plea offer, on the other hand, is not an appropriate factor to aid the jury in making its determination. As Wiggins concedes, the State may have sought a guilty plea to avoid the possibility of an acquittal in a case which involved largely circumstantial evidence. This prosecutorial concern would not, therefore, necessarily indicate that the State considered a life sentence to be the appropriate punishment for Wiggins's crimes. In other words, as the State suggests, its plea offer did not reflect on either the crime or the character of the defendant; rather, it resulted after the State evaluated the strength of its case and the concern that it had that the jury might not return a guilty verdict. Thus, the evidence of the plea offer did not bear on the defendant's character, prior record, or the circumstances of the crime, and was not relevant mitigating evidence. *See Calhoun v. State,* 297 Md. 563, 468 A.2d 45 (1983).

(*See* Paper No. 3, Exhibit 26; 324 Md. at 572-74, 597 A.2d at 1369-70).

A sentencer in a capital case must be permitted to consider any relevant mitigating factor. *See Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). However, the factor must not only be "mitigating" in general, but also must be "relevant" in particular. *See Blystone v. Pennsylvania,* 494 U.S. 299, 307, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990) ("[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant

mitigating evidence"). To be relevant, evidence must pertain to an "aspect of a defendant's character or record [or] any of the circumstances of the offense." *See Franklin v. Lynaugh,* 487 U.S. 164, 174, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality), *quoting Eddings v. Oklahoma,* 455 U.S. at 110, 102 S. Ct. 869. The Supreme Court has construed "circumstances of the crime" narrowly. *Franklin,* 487 U.S. at 174, 108 S. Ct. 2320 ("residual doubt" as to defendant's guilt held not to be a "circumstance of the offense"); *Blystone,* 494 U.S. at 306-06, 110 S. Ct. 1078 (defendant not entitled to an instruction permitting the supposed insubstantiality of the State's aggravating circumstances to be considered as a mitigating circumstance). Where, as here, the motivating factor behind the plea offer may have been a desire to avoid the possibility of acquittal due to the circumstantial nature of the evidence--rather than the State's belief that the circumstances of the offense were undeserving of the ultimate punishment-- Wiggins cannot offer evidence of the plea offer in order to generate a "residual doubt" at sentencing as to the correctness of his conviction, or to have the jury speculate as to the possible motivations for the State's offer.[26]

With regard to Wiggins's claim that other mitigating evidence was wrongfully excluded at sentencing, the Maryland Court of Appeals found as follows:

> Wiggins next contends that the trial court erred in excluding from the consideration of the sentencing jury, as relevant mitigating evidence, a three- volume collection of documents detailing potentially capital cases where a sentence less than

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[26] Respondents note by way of analogy that under Rule 408 of the Federal Rules of Evidence, a plea offer or similar compromise proposal is irrelevant and inadmissible in the proceeding to which the offer pertained.

death was imposed. He draws attention to Art. 27, § 414(e)(4), which requires this Court in every case where the death sentence has been imposed to compare it to those imposed "in similar cases" to ensure that it is not excessive or disproportionate, "considering both the crime and the defendant." Wiggins claims that sentence proportionality is an appropriate consideration for the sentencing authority as well, and that the proffered evidence should have been admitted for its consideration. He claims that, lacking this information, the sentencing jury did not have relevant information to make its sentencing decision--information which, he says, is traditionally relevant in determining the appropriate sentence and which would have assisted a jury in determining the weight to be given to aggravating factors in weighing them against mitigating circumstances. In this regard, Wiggins says that had the jury known of the frequency with which life imprisonment is imposed in murder cases of a more extreme nature than his own, it might well have determined to return a sentence less than death.

In *White v. State,* 322 Md. 738, 589 A.2d 969 (1991), we noted that proportionality review in capital sentencing cases under Art. 27, § 414(e)(4) requires the review to be conducted by this Court and not by the sentencing authority. We further noted that there is no federal constitutional requirement of proportionality review in death penalty cases, citing *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). While we recognized that evidence proffered by a defendant to establish the existence of a mitigating circumstance should be generously viewed by the sentencer, we also said that mitigating circumstances are "defendant specific" and "incident specific" and that ordinarily the findings regarding another person do not in any way tend to establish a material fact beneficial to an entirely

different individual. *White, supra,* 322 Md. at 750, 589 A.2d 969; *Johnson v. State, supra,* 303 Md. at 528-29, 495 A.2d 1. For like reasons, we also find no merit in Wiggins's further argument that the trial court erred in excluding from evidence a law review article chronicling a study which, according to the author, uncovered 350 cases in which a miscarriage of justice occurred in a potentially capital case.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 574-76, 597 A.2d at 1370-71).

I agree with this finding that this documentary evidence was relevant only with regard to the appellate court's statutorily-mandated proportionality review, and was considered in accordance with State law. (*Id.,* Exhibit 26; 324 Md. at 580-82, 597 A.2d at 1373-74). It does not constitute mitigating evidence as contemplated by *Lockett v. Ohio* and other cases cited above, in large part because it consisted of information from other cases involving other defendants, and did not reflect on any aspect of Wiggins's character, record, or circumstances of the offense. *Franklin v. Lynaugh,* 487 U.S. at 174, 108 S. Ct. 2320; *Eddings v. Oklahoma,* 455 U.S. at 110, 102 S. Ct. 869. As such, it was properly excluded from consideration by the jury. In any event, as correctly noted by Maryland's highest appellate court, there is no constitutional requirement that a defendant receive proportionality review, even on appeal. *See Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

With regard to Wiggins's claim that evidence was improperly admitted at sentencing, the Maryland Court of Appeals found as follows:

Wiggins next claims that the trial judge, during the

sentencing hearing, committed reversible error when he admitted evidence relating to a *T.V. Guide* book found in the victim's apartment at the time her body was discovered. Specifically, he claims that testimony by a police officer describing a *T.V. Guide* magazine with markings on all of the pages through the date that the victim was last seen alive, but not thereafter. . . . was irrelevant and prejudicial. He argues that it had no probative value, because no witness testified regarding the victim's habit of marking T.V. Guide magazines. Therefore, he says, it is not known when these marks were made, why they were made, or even by whom they were made.

In *State v. Joynes,* 314 Md. 113, 119, 549 A.2d 380 (1988), we applied the test which governs the admissibility of evidence in a criminal case. We noted that there are two important components of relevant evidence; materiality and probative value. Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove. Evidence which is not probative of the proposition at which it is directed is irrelevant. *Id.* at 119, 549 A.2d 380. Thus, to be of probative value, evidence must only have a tendency to prove the fact at issue; it need not establish the fact conclusively or be beyond doubt.

A daily pattern of marking each day's television programs was reflected in the magazine, and it ceased as of the time the victim was last seen alive. While it is theoretically possible that someone other than the victim made the marks, or that they were made randomly, or were all made on one day, these possibilities do not circumscribe the relevance and admissibility of the evidence. The victim lived alone, and the

factfinder could infer that the markings were made on a day-to-day basis, in a contemporaneous fashion, consistent with the victim's daily television viewing selections. We think that the date on which the markings ceased had a tendency to prove that the victim died on September 15 and, therefore, the evidence was properly admitted.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 578-79, 597 A.2d at 1372-73).

Wiggins's contention to the contrary, the admission of the *TV Guide* does not implicate the Due Process Clause of the Fourteenth Amendment. Because the court's ruling involves only a matter of state evidentiary law, it is not a ground for relief here. *See generally Estelle v. McGuire,* 502 U.S. 62, 67-70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (rejecting claim that admission of evidence violated the Fourteenth Amendment's due process guarantee).

Wiggins's next contention concerning the impact of "victim impact evidence" is equally unpersuasive. As noted by the Maryland Court of Appeals:

> Wiggins further complains that testimony by one of the victim's friends, Mary Elgert, constituted victim impact evidence which was inadmissible under *Booth v. Maryland,* 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Specifically, Ms. Elgert testified that the victim was "a very happy-go-lucky person" who was "always thinking of something interesting."
>
> We think it clear that Ms. Elgert's testimony could in no event be deemed victim impact evidence under the Court's decision in *Booth;* it did not describe the impact of the crime

> on the victim's family, or the family members' opinion, and characterizations of the crime and the defendants. *See Mills v. State,* 310 Md. 33, 72-73, n. 14, 527 A.2d 3 (1987), *rev'd on other grounds,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). The even more compelling answer to Wiggins's contention is that in *Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the Supreme Court reversed its earlier holding in *Booth,* concluding that the Eighth Amendment does not prohibit a jury from considering, at a capital sentencing hearing, "victim impact" evidence relating to a victim's personal characteristics, and the emotional impact of the murder on the victim's family. Accordingly, there was no error in admitting Ms. Elgert's testimony in evidence.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 579-80, 597 A.2d at 1373).

The state appellate court's finding is a reasonable application of Supreme Court precedent and will not be overturned here.

Error in Instructing the Jury (Claim M)

Wiggins also contends that he was denied his Fifth, Sixth, Eighth and Fourteenth Amendment rights due to the trial court's failure to give proper instructions to the jury. Specifically, he argues that the trial court failed to properly instruct the jury with regard to (1) the nature and function of mitigating circumstances; and (2) the principle of lingering doubt. He further contends that the trial court (3) failed to list nonstatutory mitigating circumstances individually; (4) improperly instructed the jury on the issue of reasonable doubt; (5) failed to require the State to prove that aggravating

circumstances outweighed mitigating circumstances beyond a reasonable doubt; and (6) failed to require that mitigating circumstances be proven by a preponderance of the evidence before they could be considered in the sentencing judgment. (*See* Paper No. 1 at 29).

Respondents correctly contend that contentions (1) through (4) are procedurally defaulted, because they were raised on post conviction review but not thereafter preserved on appeal.[27] (*See* Paper No. 3, Exhibits 44-46 and 50). Relief is unavailing on the two nondefaulted aspects of this claim (contentions (5) and (6)).

Maryland's death penalty statute requires a defendant to prove mitigating evidence by a preponderance of the evidence.[28] Furthermore, if the jury finds that one or more mitigating circumstance exists, the statute requires the jury to determine whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances.[29] The jury's reliance on these provisions in Wiggins's case were declared constitutional by Maryland's highest appellate court. (*See* Paper No. 3, Exhibit 26; 324 Md. at 582-83, 597 A.2d at 1374).

Existing Supreme Court precedent supports the constitutionality of the Maryland statute. In *Walton v. Arizona,* 497 U.S. 639, 649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (plurality), Arizona's capital sentencing statute was challenged because it imposed on defendants the burden of establishing, by

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[27] Neither cause nor prejudice sufficient to overcome procedural default can be found in the record or pleadings.

[28] *See* Md. Code Ann., Art. 27, § 413(g).

[29] *Id.*, § 413(h).

a preponderance of the evidence, mitigating circumstances sufficiently substantial to call for leniency. Four members of the Supreme Court concluded that such a burden did not violate a defendant's constitutional rights. *Id.* at 650, 110 S. Ct. 3047. These justices also concluded that the Court's decision in *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) "did not suggest that it would be forbidden to require" each . . . juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstance has been proved by a preponderance of the evidence. *Id,* 497 U.S. at 651, 110 S. Ct. 3047. This same plurality indicated that nothing in *Mills* "hinted that there was any constitutional objection to that aspect of the instructions" requiring that mitigating circumstances be proved by a preponderance of the evidence. *Id.*[30] *See also Thomas-Bey v. Smith,* 869 F. Supp. 1214, 1222-24 (D. Md. 1994) (rejecting, on basis of principle of non-retroactivity of *Teague v. Lane,*[31] claim that Maryland's capital sentencing statute is unconstitutional because aggravating circumstances need outweigh mitigating circumstances by only a preponderance of the evidence). The Maryland Court of Appeals' decision regarding the issue of allocating to the defendant the burden to prove mitigating circumstances is not an unreasonable application of Supreme Court precedent and must be upheld under 28 U.S.C. § 2254(d).[32]

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[30] Justice Scalia found no Eighth Amendment violation on other grounds. *Id.* at 656-74, 110 S. Ct. 3047.

[31] 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[32] Indeed, the Supreme Court held, in *Buchanan v. Angelone,* 522 U.S. 269, 279, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998), that the absence of instructions on the concept of mitigation and on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments.

The defendant in *Walton* also attacked Arizona's capital sentencing statute because it provided for the imposition of the death penalty if one or more aggravating circumstance was found and mitigating circumstances were insufficient to call for leniency. *Id.* at 651, 110 S. Ct. 3047. The plurality in *Walton,* relying on *Boyde v. California,* 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), found constitutional a jury instruction stating that if jurors concluded that the aggravating circumstances outweigh the mitigating circumstances, the death penalty must be imposed.[33] The Court also examined its holding in *Blystone,*[34] wherein the Court had held that the presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury. *Id.,* 494 U.S. at 306-07, 110 S. Ct. 1078; *Walton,* 497 U.S. at 651-62, 110 S. Ct. 3047. The finding of the Maryland Court of Appeals is supported by Supreme Court precedent, which finds no constitutional prohibition against instruction that a sentence of death is appropriate where a capital sentencer finds that aggravating circumstances outweigh the mitigating circumstances.

Imposition of Capital Punishment on a Mentally Retarded Individual (Claim O)

Wiggins next contends that it is unconstitutional to impose capital punishment on a mentally retarded individual. Respondents argue that the record does not demonstrate that

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[33] *Id.,* 497 U.S. at 652, 110 S. Ct. 3047; *see also Boyde,* 494 U.S. at 374, 110 S. Ct. 1190.

[34] *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990).

Wiggins is mentally retarded and, in any event, the contention as presented is barred by the procedural default doctrine.

It appears that the issue of imposition of capital punishment on the mentally retarded was fully explored--in the context of ineffective assistance of trial counsel at sentencing--at the post conviction hearing. *See* Paper No. 3; Exhibit 35 at 33-35. The issue was also raised on post conviction in pre-hearing memoranda, both in the context of ineffective assistance of counsel (*id.,* Exhibit 30 at 35 and Exhibit 32 at 13-19) and in the context of an Eighth Amendment violation. (*Id.,* Exhibit 30 at 31). These aspects of the issue were presented in Wiggins's application for leave to appeal the denial of post conviction relief. (*Id.,* Exhibit 41 at 14-20 and 21-22 (ineffective assistance claim) and at 59 (Eighth Amendment claim)). I find that both aspects of the issue are fully exhausted; are not subject to the procedural default doctrine; and must be examined on the merits here.

Counsel's failure to raise the issue of mental retardation in mitigation at sentencing is but one piece of the "ineffective assistance of counsel" puzzle more fully explored above.[35] Relief has been granted generally on the ground of ineffective assistance of counsel at sentencing, and need not be explored anew here.

On June 26, 1989 (subsequent to Ms. Lacs's murder, but prior to Wiggins's trial), a divided Supreme Court remanded a capital case involving a mentally retarded individual

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[35] Respondents correctly note that the record does not exhaustively document the extent of Wiggins's mental limitations. The social services records do not fully reveal the extent of his mental retardation, nor the testing and other criteria used to support any such conclusions.

condemned to death by a Texas jury. As noted above, while the Court declined to hold that the execution of mentally retarded people convicted of capital offenses was categorically prohibited by the Eighth Amendment, a majority of the Court found that mental retardation "may well lessen a defendant's culpability for a capital offense. . . ." and that sentencers must be able to "consider and give effect to mitigating evidence of mental retardation in imposing sentence," so that "an individualized determination whether 'death is the appropriate punishment' can be made in each particular case." *See Penry v. Lynaugh,* 492 U.S. 302 at 335, 340, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (*Penry I*).

Four days later, an amendment to Md. Code. Ann., Art. 27, § 412 took effect.[36] The purpose of the amendment was to afford protection to individuals charged with capital crimes who possessed "significantly subaverage intellectual functioning as evidenced by an intelligence quotient of 70 or below ...and impairment in adaptive behavior," where such "mental retardation is manifested before the individual attains the age of 22." *See* Art. 27, § 412(f)(3). The maximum penalty for first degree murder committed by a mentally retarded defendant under the statute no longer was death, but rather life imprisonment or, upon proper notice, life imprisonment without the possibility of parole. *Id.,* §§ 412(g)(1) and (2).

The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. Since its enactment in 1789, those prohibitions have expanded, in conjunction with the "evolving standards of decency that mark

[36] The *Penry* Court noted the Maryland amendment in its opinion. At that time, only Georgia and Maryland had codified prohibitions against the execution of the mentally retarded.

the progress of a maturing society." *See Ford v. Wainwright,* 477 U.S. 399, 406, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Trop v. Dulles,* 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). While the Supreme Court has not held that execution of the mentally retarded violates our "evolving standards of decency,"[37] it has required the presentation of such information in mitigation at the sentencing phase of capital trials. Clearly, the information contained in the DSS records indicated that Wiggins might be mentally retarded. If full investigation revealed mental retardation, counsel, under the case law existing at that time, was required to (1) argue that the statute barred imposition of the death penalty against Wiggins, and (2) if unsuccessful there, argue Wiggins's mental retardation as a mitigating factor to be considered by the sentencing jury. The fact that counsel at sentencing failed to investigate this possibility is but another element demonstrating that Wiggins received ineffective assistance of counsel at the sentencing phase.

Arbitrary Application of the Death Penalty (Claim P)

Wiggins also argues that the death penalty as applied across the various Maryland jurisdictions is arbitrarily and disproportionately applied, and that it was unfairly applied to him despite the State's weak case involving circumstantial evidence; his lack of prior criminal record; and his low IQ. Respondents urge this Court to find Wiggins's "proportionality" claim procedurally defaulted or, alternatively, to find the claim is not cognizable under 28 U.S.C. § 2254(a).

[37] Whether it may do so in the near future, in light of comments made by several of the justices, remains to be seen. *Certiorari* is pending in a capital case involving a mentally retarded defendant. *See Skipper v. Lee,* 238 F.3d 414, 2000 WL 1853330 (4th Cir. 2000).

In *Furman v. Georgia,*[38] the Supreme Court concluded that the death penalty was imposed in such a discriminatory,[39] wanton, freakish[40] and infrequent manner,[41] that any death sentence imposed by a State constituted cruel and unusual punishment. Since that time, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. The Supreme Court has examined "the gravity of [an] offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions," and at times has struck down punishments as inherently disproportionate--and therefore cruel and unusual--when imposed for a particular crime or category of crime.[42] *Pulley v. Harris,* 465 U.S. 37, 42-43, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

In response to *Furman,* many states revised their capital sentencing statutes,[43] while others merely revised their capital sentencing procedures. Such revisions by and large attempted to limit jury discretion and avoid arbitrary and inconsistent

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[38] 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[39] 408 U.S. at 240, 92 S. Ct. 2726.

[40] *Id.* at 306, 92 S. Ct. 2726.

[41] *Id.* at 310, 92 S. Ct. 2726.

[42] *See, e.g., Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (striking down sentence of life without parole for fourth conviction for relatively minor felonies); *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (striking down capital sentence for defendant who aided and abetted but did not commit murder during course of robbery); *Coker v. Georgia,* 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (striking down capital sentence for rape of adult).

[43] Those revisions generally focused on mandatory appellate review of capital sentences; limitations placed on the number of crimes for which capital sentencing could be imposed; and the requirement that aggravating circumstances be present and mitigating circumstances be considered.

results. Many states, including Maryland, devised schemes that required courts reviewing capital sentences determine whether, considering both the crime and the defendant, such sentences were disproportionate to sentences imposed in similar cases.[44] Although these proportionality safeguards were created by the states in response to *Furman,* the Supreme Court itself has never imposed a *requirement* upon the states to conduct proportionality review in capital cases.[45]

Wiggins's claim was reviewed on direct appeal, as provided by statute.[46] (*See* Paper No. 3, Exhibit 26 at 13; 324 Md. 551, 580-82, 597 A.2d 1359). Inasmuch as Wiggins's conviction and sentence are set aside pursuant to this Memorandum, I need not consider his proportionality claim here.

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[44] Maryland is among the states imposing this requirement pursuant to statute. In other states that have adopted such review, the appellate court examines proportionality despite the absence of a statutory requirement. In other states, no such review is undertaken, either by practice or by statute. *See Pulley,* 465 U.S. at 44, 104 S. Ct. 871.

[45] *See, e.g., Jurek v. Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (death sentence upheld even though state case law and statutory schemes did not provide for proportionality review); *Zant v. Stephens,* 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), *cited in Pulley,* 465 U.S. at 48-51, 104 S. Ct. 871. Indeed, the Court has held that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant,* 462 U.S. at 885, 103 S. Ct. 2733, *quoting Lockett v. Ohio,* 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion).

[46] Proportionality review in capital cases is required pursuant to Md. Code Ann., Art. 27, § 414(e)(4). Because the claim was clearly raised before the Maryland Court of Appeals on direct appeal, the procedural default doctrine does not bar its consideration here

The Death Penalty is Excessive (Claim Q)

Invoking the Fifth, Sixth, Eighth and Fourteenth Amendments, Wiggins argues that "the sentence of death is in all cases excessive punishment." (*See* Paper No. 1 at 36; *see also* Paper No. 4 at 57). I note that this claim has been procedurally defaulted,[47] and in any event does not represent the law as set forth by current Supreme Court precedent.[48]

Ineffective Assistance of Appellate Counsel (Claim R)

As a final argument, Wiggins complains that he received ineffective assistance of appellate counsel, because counsel failed to argue on appeal certain claims raised herein, to wit: (Claim H) inadequate voir dire of jurors; (Claim I) wrongful excusal of prospective jurors; (Claim L) improper evidentiary rulings by the sentencing court; (Claim M) improper instruction of the jury; (Claim O) imposition of capital punishment on a retarded individual; (Claim P) arbitrary application of the death penalty in Maryland; and (Claim Q) the death penalty is excessive punishment under all circumstances.

Respondents properly contend that appellate counsel's failure to raise Claims H, I, L, M, P and Q requires a finding that these claims are procedurally defaulted. Although Wiggins

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[47] Wiggins did not present this claim on direct appeal. *See* Paper No. 3, Exhibits 15, 16 and 26. Although raised at post conviction at the Circuit Court level, *id.*, Exhibit 30 at 31 and Exhibit 38 at 45- 47, the claim was not preserved when Wiggins sought leave to appeal the denial of post conviction relief. *Id.*, Exhibits 44-46 and 50.

[48] Since 1976, the Supreme Court has upheld imposition of the death penalty by the various states under certain circumstances. *See Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality) and its progeny.

argued at post conviction that these claims should have been raised on direct appeal, he abandoned such argument when seeking leave to appeal the denial of post conviction relief. (*See* Paper No. 3, Exhibits 44 and 46). None of these claims presents a basis for relief, and petitioner cannot argue that he was prejudiced by appellate counsel's failure to articulate same on direct appeal.

As to Claim O, the trial record does not appear to contain adequate support for appellate counsel to have concluded that Wiggins was mentally retarded. Indeed, trial counsel failed to adequately explore the issue of Wiggins's mental development and present such information as mitigation at sentencing. Therefore, it is reasonable to conclude that appellate counsel employed appropriate strategy by not raising the issue on appeal, thus reserving the claim more appropriately for development at post conviction proceedings.

Accordingly, the instant petition for habeas corpus relief will be denied in part and granted in part, as set forth in the accompanying Order.

Date: September 18, 2001

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

Appendix D

United States District Court
District of Maryland

Kevin WIGGINS
v.
Thomas R. CORCORAN, Warden William Sondervan, Commissioner of Corrections J.
Joseph Curran, Jr., Attorney General, State of Maryland

No. JFM-99-2420.

Sept. 18, 2001.

ORDER

In accordance with the foregoing Opinion, IT IS this 18th day of September, 2001 by this Court hereby ORDERED:

1. That the above-captioned petition for habeas corpus relief, filed pursuant to 28 U.S.C. Section 2254 (Paper No. 1) IS GRANTED as to petitioner's claims of insufficiency of the evidence and ineffective assistance of counsel with regard to the failure to present mitigating evidence during sentencing;

2. That petitioner's claims are OTHERWISE DENIED;

3. That the conviction and sentence of Kevin Wiggins ARE VACATED;

4. That petitioner shall be RELEASED within THIRTY (30) DAYS unless within that time respondents advise this court that they intend to appeal this decision, in which event

counsel shall contact the court to discuss the issue of the appropriate forum to consider the question of petitioner's release pending appeal;

4. That the Clerk of Court CLOSE this case; and

5. That the Clerk of Court MAIL a copy of this Order, together with the foregoing Memorandum, to petitioner; to petitioner's counsel, Donald Verrilli; and to Assistant Attorney General Ann N. Bosse.

Date: September 18, 2001

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

Appendix E

Court of Appeals of Maryland.

Kevin WIGGINS
v.
STATE of Maryland.

No. 121, Sept. Term, 1997.

Feb. 10, 1999.

Stuart M. Rennert (Donald B. Verrilli, Jr., Gregory P. Magarian, Elena N. Broder, Heidi D. Kitrosser, Jenner & Block, on brief), Washington, DC, for Appellant.

Ann N. Bosse, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., on brief), Baltimore, for Appellee.

Argued before BELL, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, RAKER, WILNER and CATHELL, JJ.

WILNER, Judge.

In 1989, appellant was convicted by Judge J. William Hinkel, sitting in the Circuit Court for Baltimore County, of the robbery and first degree murder of Florence Lacs and two counts of theft. A jury summoned to determine the appropriate punishment for the murder found that appellant should be put to death, and, upon that verdict, Judge Hinkel imposed a sentence of death. We affirmed that judgment in *Wiggins v. State,* 324 Md. 551, 597 A.2d 1359 (1991), *cert. denied,* 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992), rejecting appellant's claims that the evidence was legally insufficient to

establish that he was the murderer and that the trial court erred in denying his motion for new trial.

In January, 1993, appellant filed a petition for relief under the Post Conviction Procedure Act (Maryland Code, Article 27, § 645A), ultimately raising 38 claims embodying 52 issues, among which were that he was denied the effective assistance of counsel at both his trial and his sentencing proceeding. After an extensive evidentiary hearing, the hearing judge, John F. Fader, II, announced from the bench his tentative conclusion that counsel had been deficient in at least two respects--failing at trial and at sentencing to elicit evidence from the assistant medical examiner regarding her initial determination as to the approximate time of Ms. Lac's death, and failing at the sentencing proceeding to present certain mitigating evidence--but he reserved judgment as to whether those deficiencies were sufficiently prejudicial to warrant post-conviction relief. Judge Fader indicated that a written opinion would be filed within 60 days. In October, 1997--three-and-a-half years later--he filed a 257-page opinion finding no Constitutional deficiencies at either the trial or the sentencing proceeding and therefore denying relief.

We granted appellant's application for leave to appeal that determination. Five issues are presented in the appeal, which we have reordered as follows:

(1) Whether trial counsel provided Constitutionally ineffective assistance at trial and sentencing by failing to "bring to light" evidence of a prior inconsistent opinion on the part of the State's medical expert regarding time of death;

(2) Whether trial counsel provided Constitutionally

ineffective assistance (A) at trial by failing timely to obtain a forensic expert, thereby requiring appellant to choose between a jury trial without an expert and a court trial with one; and (B) at sentencing by failing to investigate, offer evidence of, or object to jury selection procedures in Baltimore County;

(3) Whether trial counsel provided Constitutionally ineffective assistance at the sentencing proceeding by failing to investigate and offer mitigation evidence concerning appellant's traumatic background and mental problems;

(4) Whether appellant was denied Constitutional rights when the State failed to disclose an agreement to treat his girlfriend, Geraldine Armstrong, leniently; and

(5) Whether the evidence was legally sufficient to support (A) his conviction of murder in the first degree; or (B) the jury's finding that he was a principal in the first degree in the murder of Ms. Lacs.

For the reasons stated in this Opinion, we shall affirm the denial of post- conviction relief.

BACKGROUND

The 77-year old victim, Florence Lacs, resided in the Clark Manor Apartments, in Woodlawn. When she failed to attend a scheduled social event on Saturday, September 17, 1988, a friend reported her missing. At the request of the police, the apartment manager entered Ms. Lacs's apartment to investigate and found her dead in the bathtub. She was lying on her side, half covered by cloudy water. It appeared that a household

cleaner and a bug spray had been poured or sprayed on her. She was wearing a white blouse and a blue skirt, but had on no underwear. The skirt had been raised to her waist. The apartment had been ransacked. Paramedics, who arrived shortly thereafter, formally pronounced Ms. Lacs dead at about 3:50 in the afternoon. The deputy medical examiner, Dr. Stanley Felsenberg, arrived around 9:00 p.m., and, while there, had the body removed from the tub, examined it, and caused it to be sent to the medical examiner's office, where, near midnight, it was tagged and refrigerated. Dr. Margarita Korell, an assistant medical examiner, performed an autopsy at 9:00 the next morning, September 18, 1988. There is evidence that the death certificate completed by Dr. Korell estimated the time of death as Friday evening, September 16, 1988.[1] Dr. Korell listed the cause of death as drowning and the manner of death as homicide.

Appellant was a painter who had been working with a construction crew in the victim's apartment building on Wednesday, September 14, and Thursday, September 15. At some point on Thursday, Ms. Lacs asked him to move a truck

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[1] The death certificate was identified by Dr. Korell and admitted as Defendant's Exhibit 4 at the sentencing proceeding. There is no indication in the record that it was offered or admitted at the trial before Judge Hinkel. We are unable to locate the certificate in the record now before us. In his dissent in the direct appeal, Judge Eldridge stated that "[t]he Death Certificate, as originally filled out by the State's expert, fixed the approximate time of death as Friday evening," (*Wiggins*, 324 Md. at 585, 597 A.2d at 1375) and that is consistent with testimony in the record. The record in this appeal, which consists of documents presented at the trial, the sentencing hearing, and the post- conviction hearing, is quite large and not well-indexed. A number of documents and papers appear to be missing. As there seems to be no dispute that the original certificate listed the approximate time of death as noted, the fact that the document cannot be located is not important.

that was blocking her car. Ms. Lacs attended a social event with some of her friends that afternoon but had returned to her apartment by 5:00 p.m. She was seen conversing with appellant in the hallway just outside her apartment between 5:00 and 5:50. Chianti Thomas, a twelve-year-old child visiting a friend at the next-door apartment, testified that Ms. Lacs's assistance was sought in locking the door to the friend's apartment, that appellant appeared from the basement and volunteered his assistance, and that she heard Ms. Lacs and appellant briefly converse about "watching" some sheetrock. That was the last time Ms. Lacs was seen alive.

On Thursday evening, around 7:45 p.m., appellant arrived at the home of his girlfriend, Geraldine Armstrong, driving the victim's car. He and Ms. Armstrong went shopping, using the victim's credit cards, which appellant told Ms. Armstrong belonged to his aunt. They repeated that activity the next day (Friday, September 16) as well. On Saturday, they pawned a ring that belonged to Ms. Lacs. Appellant and Armstrong were arrested on September 21, while driving Ms. Lacs's car. Upon his arrest, appellant claimed that he had found the car, with the keys, credit cards, and ring in it, on Friday, on a restaurant parking lot. That, of course, was inconsistent with the otherwise undisputed fact that he was in possession of the car and the credit cards on Thursday evening.

Principally on this evidence, the State charged appellant with first degree murder, robbery, and theft, and sought the death penalty. Appellant, represented by Carl Schlaich and Michelle Nethercott, waived a jury trial and elected to be tried before Judge Hinkel. After a four-day trial, Judge Hinkel found appellant guilty of robbery, first degree felony murder, and theft. Appellant then elected to have his sentence on the murder conviction determined by a jury, which was summoned for that

purpose. After a six-day hearing, the jury found that appellant was a principal in the first degree, that the murder was committed in the course of robbing the victim (an aggravating factor), that appellant had not previously been convicted of a crime of violence (a mitigating factor), that the aggravating factor outweighed any mitigating factors, and that the sentence should be death.[2] While automatic review of that judgment was pending in this Court, appellant moved for a new trial, which Judge Hinkel denied. As noted, we affirmed the judgments, and the United States Supreme Court denied appellant's petition for *certiorari*.

DISCUSSION

Time of Death

The evidence of appellant's guilt, at least of murder, was almost entirely circumstantial, there being neither eyewitness testimony nor physical evidence directly connecting appellant to the murder itself or to the interior of Ms. Lacs's apartment. The State's theory was that appellant had entered Ms. Lacs's apartment between 5:00 and 5:30 on Thursday afternoon, robbed her, and, in the commission of the robbery, forced her into the bathtub and drowned her. Her death may have been facilitated by her significant cardiovascular disease, which was listed on the death certificate as a contributing factor.

The State's case rested essentially on seven facts or circumstances: (1) the fact that Ms. Lacs was seen by friends as late as 4:15 p.m. on Thursday, September 15, in her car, wearing a blue skirt and a white blouse; (2) when found dead on Saturday in the bathtub, she was wearing a blue skirt and a

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[2] One or more, but fewer than 12, jurors also listed as a mitigating factor "His background."

white blouse;[3] (3) the fact that her weekly TV Guide had programs marked through September 15, with no markings for the 16th or beyond; (4) although appellant finished work at 4:45 p.m. on Thursday and had no particular reason to remain on the premises, he was seen with Ms. Lacs in the hallway outside her apartment between 5:00 and 5:30 p.m., which was the last time anyone saw her alive; (5) his explanation to his supervisor, who saw him at the apartment building some 25 minutes after appellant finished work, that he needed to move some sheetrock and the supervisor's response that (i) he had not asked appellant to move any sheetrock, (ii) moving sheetrock was not part of appellant's job, and (iii) in any event, moving the sheetrock should not have taken more than a few minutes; (6) appellant's possession and unlawful use of Ms. Lacs's automobile, credit cards, and jewelry later that evening; and (7) incriminating statements that appellant allegedly made to two fellow inmates during his pre-trial detention. Judge Hinkel, in announcing his verdict, gave no weight to the testimony of the two fellow inmates.

Apart from the overall circumstantial nature of the case as to criminal agency, four particular circumstances caused the defense to focus on medical evidence regarding the

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[3] The evidence regarding Ms. Lacs's skirt was not without contradiction. One of her friends, Elizabeth Lane, testified that Ms. Lacs was wearing a red skirt on Thursday, and different recollections of the exact color of the skirt she was found in were recorded. There was testimony that it was light blue and that it was teal or blue-green. There was evidence that it was a darker blue. *See Wiggins v. State, supra,* 324 Md. at 586, 597 A.2d at 1376 (J. Eldridge, dissenting). Judge Hinkel found, as a fact, that Ms. Lane was mistaken and that Ms. Lacs was wearing the same outfit, when found in the bathtub, that she was wearing on Thursday afternoon. Inferentially, in finding appellant to have been a principal in the first degree in Ms. Lacs's murder, the jury made the same determination.

approximate time of death: (1) Ms. Lacs was clearly still alive at 5:00 to 5:30 on Thursday, September 15; (2) by 7:45 that evening, appellant was in possession of her car and items allegedly taken from her or her apartment; (3) although appellant reported briefly for work on Friday morning, September 16, there was no direct evidence that he was in or near Ms. Lacs's apartment after 5:30 on Thursday afternoon; and (4) one of Ms. Lacs's friends, Edith Vassar, testified that Ms. Lacs telephoned her at 10:00 or 10:30 on Friday morning, September 16. In the view of the defense, unless the State could show that Ms. Lacs was or could have been killed during the approximately two-hour window between 5:30 and 7:30 p.m. on September 15, its evidence that appellant was the killer, as opposed to merely a thief, would have been much less persuasive.

The issue of time of death first came before the court in the context of a pre-trial motion to dismiss or narrow the indictment. The indictment charged that the killing occurred between September 15 and September 17, and, based on the holding of the Court of Special Appeals in *State v. Mulkey,* 73 Md. App. 501, 534 A.2d 1374 (1988), appellant claimed that the indictment was not sufficiently particular--that the State should be required to allege with greater precision when the murder occurred.[4] In arguing the motion, Mr. Schlaich

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[4] In *Mulkey,* the indictment charged the defendant with committing child abuse and sexual offenses between June 1 and September 6, 1982, June 1 and September 5, 1983, and June 1 and September 3, 1984. The Court of Special Appeals affirmed an order dismissing the indictment as not complying with particularity requirements. Shortly before the hearing on appellant's motion, we reversed the judgment of the Court of Special Appeals, holding that the trial court should have ruled on a pending demand for particulars before dismissing the indictment. We remanded the case for further proceedings, not ruling out the prospect of an ultimate dismissal. *See*

informed Judge Hinkel that Ms. Nethercott, his co-counsel, had interviewed Dr. Korell on July 18, 1989, and that Dr. Korell had said that (1) she *could* prescribe a range of time of death, but (2) the State had never asked her to do so. Probed by the court, Mr. Schlaich said that Dr. Korell had advised Ms. Nethercott that "the outside limit at that point would have been 24 hours" and more likely would be about 12 hours. Her opinion thus was that death probably occurred between 12 and 24 hours prior to discovery of the body at 3:50 p.m. on September 17. That would have been consistent with what she put on the death certificate. Mr. Schlaich said further that, as the result of a call from the Assistant State's Attorney, Dr. Korell called his office two days later and advised that she had changed her opinion as to time of death. She apparently told Ms. Nethercott that, after consulting with a "female supervisor" whom she would not name, she came to believe that death could have occurred up to 48 hours prior to discovery of the body. Mr. Schlaich noted:

> "Obviously, that's something we can attack later on at trial, but I'm pointing this out to the court because it is indicative of how key of an issue the time of death is about to become and will be in this case.
>
> The Medical Examiner now calls us herself and says, 'I've got to point out to you that I must have been wrong.' So obviously, it is getting around that this is going to be important. The reason it is going to be important is the State

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State v. Mulkey, 316 Md. 475, 560 A.2d 24 (1989). Appellant was made aware of our holding in *Mulkey* just prior to the hearing. His point was that the law still required some particularity and that he should not be put in a position of effectively having to establish an alibi for a three-day period. Whether appellant was entitled to a dismissal or narrowing of the indictment under *Mulkey* is not an issue in this appeal.

> in its own indictment and certainly in all of the evidence provided in discovery indicates that Mr. Wiggins was in possession of the victim's property on September the 15th. She is found dead on September the 17th. That's a three day span."

Mr. Schlaich continued by noting the importance of the alleged robbery, which would serve as an aggravator for purposes of the death penalty: "Obviously, if Mr. Wiggins has the property before she is dead, there's a problem with that aggravator. If Mr. Wiggins acquires the property after she is dead, then maybe that's not true."[5] If, as Dr. Korell initially believed, death occurred within 24 hours before discovery of the body, appellant would have been in possession of the stolen property before Ms. Lacs was murdered. Mr. Schlaich also noted the statement of Ms. Vassar that Ms. Lacs had called her on Friday morning, September 16. "So," he concluded, "there's a serious and obvious issue here as to time of death."

The prosecutor, in response, told the court that her information from the medical examiner's office was that they could not establish a more particular time of death, and that is why the indictment was worded as it was--that Ms. Lacs was last seen alive on September 15 and was discovered dead on September 17. Essentially on that basis, the court denied the defense motion to dismiss or particularize the indictment.

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[5] Not only would the fact that a homicide occurred during the course of a robbery elevate the homicide to first degree felony murder (Md. Code, Article 27, § 410), thereby making the perpetrator subject to the death penalty (Article 27, § 412(b)), but the fact that the murder was committed during the commission or attempted commission of a robbery constitutes an aggravating factor for purposes of imposing the death penalty (Article 27, § 413(d)(10)).

The issue next surfaced at trial. In an opening statement, Ms. Nethercott recounted that the medical examiner (Dr. Korell) had told counsel that Ms. Lacs had not been dead for 48 hours but later reevaluated that view. Dr. Korell was called to testify as a State's witness. By way of background, Dr. Korell, who apparently was raised in Argentina, had been an assistant medical examiner for about 10 years when she performed the autopsy on Ms. Lacs. Although she was not board-certified, she had performed over 3,000 autopsies and was qualified as an expert in forensic pathology in every county of Maryland, in Federal court, and in Washington, D.C., New York, Illinois, and Florida. Dr. Korell recounted her findings from the autopsy--that Ms. Lacs died of drowning and that the manner of death was homicide. When asked by the prosecutor whether she could determine how long Ms. Lacs had been dead, Dr. Korell said that it would be a guess, somewhere between 12 and 48 hours.[6] She noted that the body had been in the refrigerator all night and said that it would help if she knew the condition of the body when Dr. Felsenberg examined it on the evening of September 17.[7] With the information available, she

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[6] It is not entirely clear whether Dr. Korell was estimating from the time of the autopsy on Sunday morning or from the time the body was removed from the water on Saturday evening. At one point, she spoke in terms of when she performed the autopsy, but at another she spoke of whether the body was in the water for 12, 36, or 48 hours. Based on her testimony at the sentencing hearing, *see ante,* it appears that she was referring to when the body was removed from the water. That would have put the earliest time of death at about 9:00 Thursday evening.

[7] Dr. Felsenberg made a written report of his findings, and Dr. Korell acknowledged having read that report. It does not appear that a copy was ever admitted into evidence, however. There is in evidence, as State's Exhibit 47, a file memorandum from Mr. Schlaich dated July 24, 1989, reporting a conversation that he had with Dr. Felsenberg regarding the report. According to the memorandum, Dr. Felsenberg said that "he cannot place an outside limit on the time of death, however, he recalls that the police were clear that Ms. Lacs had been alive at 1030 on September 17 (Saturday), which would be consistent with what he saw. He also remembers that the last contact from the victim was by phone with a friend." There is no evidence in the record, and no recorded report from the police, that Ms. Lacs was alive on Saturday. Dr. Felsenberg may have been referring to Ms. Vassar's statement that she spoke with Ms. Lacs on Friday morning.

was not able to express an opinion within a reasonable degree of medical certainty "as to time of death."

Mr. Schlaich, on that ground, moved to strike Dr. Korell's testimony, but the court denied the motion, leaving her testimony as indicating that "she's unable to say with any degree of medical certainty or probability what the maximum period of time was." Mr. Schlaich then cross-examined Dr. Korell with regard to a number of her findings but did not inquire further about a time of death. He did not ask about the conversation she had with Ms. Nethercott, about her initial view that death occurred within 24 hours prior to discovery of the body, about the statement on the death certificate attesting that death occurred on Friday, September 16, about the conversation she supposedly had with her supervisor, or about the reported change in her opinion.

Appellant produced his own expert, Dr. Gregory Kauffman, to testify as to time of death. Dr. Kauffman was a forensic pathologist and a lawyer. He had served as an assistant medical examiner in Maryland, in California, and in Michigan, and had conducted some 4,000 autopsies, although, like Dr. Korell, he was not board-certified. He examined Dr. Korell's autopsy report, photographs of the body taken at the scene, the photographs taken of the body just prior to the autopsy, the paramedic's report, and Mr. Schlaich's memorandum of his conversation with Dr. Felsenberg, and he

said that he was aware of how and when the body was discovered and its condition when discovered. Based in large part upon the pictures of the body taken at the scene and at the time of autopsy, he opined, within a reasonable degree of medical certainty, that Ms. Lacs had not been dead for more than 18 hours prior to the time the body was removed from the bathtub and photographed at the apartment (or 21 hours before it was delivered to the medical examiner's office and refrigerated). That would have made the earliest time of death 3:00 a.m. on Saturday. Of importance to him was the lack of any noticeable decompositional changes, particularly in those parts of the body that had not been submerged in the bathtub. He stated that, due to the refrigeration, there would have been no significant decomposition between the time the body was refrigerated and the time the photograph was taken the next morning. Although aware of Dr. Felsenberg's statement that Ms. Lacs was last known to be alive on Saturday, Dr. Kauffman said that he gave no significance to that in determining his estimate of when she died.

In light of Dr. Kauffman's testimony, the State called in rebuttal Deputy Chief Medical Examiner Ann Dixon, but, because she had not been listed as a witness in discovery and had never rendered a report, the court sustained appellant's objection to her testifying.

In announcing his findings, Judge Hinkel began by stating the evidence that he found not to be credible. That included the testimony of appellant's fellow inmates as to the supposed incriminating statements made by appellant, appellant's written statement given to the police upon his arrest that he had found Ms. Lacs's car, with the credit cards and jewelry in it, on a parking lot on Friday, September 16, Ms. Lane's testimony that Ms. Lacs was wearing a red skirt, rather than a blue one, on

Thursday, and Ms. Vassar's testimony that Ms. Lacs called her on Friday, September 16. Ms. Lane and Ms. Vassar, he concluded, were simply mistaken. He did find, however, that appellant was at the scene on Thursday, that he knew Ms. Lacs from their earlier conversation that day, that he acquired her car and property on Thursday, and that, after work on that Thursday, he entered Ms. Lacs's apartment where he robbed and killed her. As to the time of death, Judge Hinkel stated:

> "I don't know the exact time of death. I am persuaded, however, from all of the evidence that the death of Ms. Lacs did not occur sometime between 9 p.m. on September 17th and 3:00 a.m. on 9--17, which would be the 18 hour period that was testified to by Dr. Kauffman. I am persuaded that it occurred on Thursday the 15th of September."

As noted, appellant elected to have his sentence determined by a jury, which was his right under Md. Code, Article 27, § 413(b). In order to impose the death penalty, the jury was required to find, unanimously and beyond a reasonable doubt, that appellant was a principal in the first degree to the murder of Ms. Lacs (Md. Code, Article 27, § 413(e)(1); *Baker v. State,* 332 Md. 542, 570, 632 A.2d 783, 796 (1993), *cert. denied,* 511 U.S. 1078, 114 S. Ct. 1664, 128 L. Ed. 2d 380 (1994)), and, as the jury had heard none of the evidence presented at the trial before Judge Hinkel, much of the evidence presented earlier was presented again. With respect to time of death, the State called both Dr. Korell and Dr. Dixon.

Dr. Korell informed the jury that Ms. Lacs died of drowning, with contributory arteriosclerotic cardiovascular disease, and that the manner of death was homicide. She said that she could not pinpoint a time of death--that "time of death never can be pinpointed unless somebody dies right in front of

somebody else"--but estimated, within a reasonable degree of medical certainty, that Ms. Lacs "could have died 24 to 48 hours before she was found." In part, that conclusion was based on Dr. Korell's opinion that the water in the bathtub was cold water, which would better have preserved the body. She believed that the water was cold because "[Ms. Lacs] did not look like she was scalded in any way." Her estimate was also based, in part, on the fact that rigor mortis and livor mortis were present when Dr. Felsenberg examined the body.

On cross-examination, Dr. Korell made clear that the 24 to 48 hour period she spoke of dated back from when Dr. Felsenberg arrived at 9:00 on Saturday evening (September 17), which would place the earliest estimated time of death at 9:00 on Thursday evening (September 15). She acknowledged that that estimate would be consistent with evidence that Ms. Lacs had a telephone conversation at about 10:30 on Friday morning. She clarified that, by "cold water," she meant water at about room temperature--cooler than lukewarm. Like at trial before Judge Hinkel, Dr. Korell was not asked about her initial view that death occurred within 24 hours prior to the body being found or about the conversations she allegedly had with Ms. Nethercott concerning that opinion and her change of mind.

Dr. Dixon confirmed that it was "all but impossible" to pinpoint a time of death "within the ground of reasonable medical certainty," but said that it was possible, by assessing the degree of post-mortem changes to the body along with a number of other factors, to determine a range. She identified, in particular, whether rigor mortis and post-mortem lividity have become fully developed and whether there was skin slippage--separation of the outer epidermal layers of the skin caused by the onset of decomposition. Based on her review of the autopsy report, she opined that death occurred at least 24

hours before the body was examined by Dr. Felsenberg "and it could easily have been 36 to 48 hours or even more, based on the body changes." Dr. Dixon agreed that the lack of "scalding," which she said could occur even at comfortable bath temperature, indicated to her that the bath water was "cool at most."[8] Dr. Dixon stated that she observed nō skin slippage on the photographs taken of the body. On cross-examination, Dr. Dixon admitted that she had a conversation with Dr. Korell about Korell's statement on the death certificate that death had occurred on Friday, September 16, and that she indicated to Dr. Korell that "she could extend her range back to 48 hours," because the body was found in cold water and "because of the post mortem changes which had occurred since . . . death."

In place of Dr. Kauffman, the defense produced as its expert at sentencing Dr. Comparini, deputy medical examiner for the District of Columbia. Dr. Comparini described for the jury in some detail what happens to a body after death--the onset and eventual relaxation of rigor mortis, the development and fixing of livor mortis, and other decompositional changes. Based on her review of the autopsy report, the various photographs that were taken at the crime scene and at the autopsy, and Dr. Felsenberg's observations, she opined that death would have occurred "not more than 24 to 36 hours" prior to the autopsy on Sunday morning, September 18, which would have made the earliest time around 9:00 p.m. on Friday, September 17. On cross-examination, the State brought out that Dr. Comparini was not board-certified, that she had never before testified in a death penalty case, and that she had not consulted with either the police or the Maryland medical

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[8] Given the fact that Ms. Lacs was almost fully clothed, it is certainly a fair inference that she had not gotten into the bathtub to take a bath and would not, therefore, have filled the tub with warm water.

examiners before reaching her conclusions. She found it essentially irrelevant that the body was found partially submerged in water. Dr. Comparini did indicate, however, that the changes "after 36 and 48 [hours] . . . [are] quite similar," and that the decompositional changes are gradual.

In argument to the jury, the State noted one point of agreement between the medical experts--that a precise time of death could not be determined. The prosecutor argued, in rebuttal, that "[W]e can't tell from the medical testimony alone when Ms. Lacs was murdered. . . ." She stressed the fact that, from the brief conversation they had on Thursday, when Ms. Lacs asked appellant to move the truck, appellant knew Ms. Lacs and that he knew which car was hers. She noted further that appellant was in Ms. Lacs's presence outside her apartment when she was last seen alive between 5:00 and 5:30, that he was in possession of her credit cards, jewelry, and car about two hours later, and that he lied about whose credit cards they were and how he came into possession of her car. The State asked the jury to find that he was the killer--a principal in the first degree--from those circumstances. Defense counsel paid more attention to the medical testimony, noting Dr. Korell's estimate that death could have occurred as early as 48 hours before Dr. Felsenberg's examination (or 9:00 p.m. Thursday) but reminding the jury that on the death certificate she had listed the time of death as being on Friday. Counsel also pointed out Dr. Comparini's testimony placing the earliest time of death at 9:00 Friday evening.

In deciding upon the death sentence, the jury expressly found that appellant was a principal in the first degree in Ms. Lacs's murder.

Appellant filed a motion for new trial that Mr. Schlaich

represented was based on "finding out new evidence at the sentencing phase that would have not been available to us at the guilt/innocence trial."[9] The entire thrust of the motion, taken from the argument presented in support of it, was Dr. Korell's shifting opinions as to the earliest possible time of Ms. Lacs's death. In a nutshell, defense counsel complained that (1) at the time of the autopsy, as evidenced by her death certificate, and as late as July 18, 1989, Dr. Korell believed that death occurred at the earliest on Friday afternoon or evening, September 16; (2) on July 20, after discussing the matter with her supervisor, she concluded that death could have occurred as early as 48 hours prior to September 17; (3) at trial, she opined that it was all guesswork and that she could not state a range within a reasonable degree of medical certainty; but (4) at sentencing, she was back to her July 20 view that death could have occurred as early as Thursday evening at 9:00. Coupled with that was the fact that the State had not disclosed Dr. Dixon in discovery and the contention that, had the defense known that Dr. Dixon would opine a range going back to 9:00 Thursday evening, the defense would not have objected to her testimony.

Arguing the motion, Ms. Nethercott explained that, on July 18, 1989-- about two weeks before trial commenced--she met personally with Dr. Korell, that Dr. Korell, after reviewing her file, expressed the opinion that Ms. Lacs "had died somewhere in the range of 4 to 10 hours prior to the discovery of the body at 4:00--Dr. Felsenberg examined the body at 9:00--and that her outside limit, her furthest absolute limit was 24 hours." Ms. Nethercott stated further that she had asked Dr. Korell three times whether, in light of that conclusion, the victim was not dead as of 4:00 on September 16, "and she said yes." Ms. Nethercott continued that, on July 20, Dr. Korell called and

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[9] We are unable to locate the motion in the record before us.

said that, following a conversation with her supervisor, she had changed her opinion "and was now willing to extend her range on time of death back to 48 hours from the 17th of September." On July 23, the Chief Medical Examiner, Dr. Smialek returned a call from Mr. Schlaich. Dr. Korell, who was on an extension, again confirmed "that she had changed the opinion and that she had discussed this matter, after having thought about it, and that she now had a different opinion."

Ms. Nethercott recalled that, at trial, Dr. Korell testified that she could not state a time of death within a reasonable degree of medical certainty, whereas, at the sentencing proceeding, she testified, to a reasonable degree of medical certainty, that Ms. Lacs had been dead 24 to 48 hours prior to Dr. Felsenberg's examination. That would have put the earliest time of death at 9:00 on Thursday which, Ms. Nethercott argued, was not consistent with the State's theory. Her trial testimony, according to Ms. Nethercott, created a factual issue--whether it was possible to estimate a time of death--that placed into dispute Dr. Kauffman's testimony. Had Dr. Korell testified at trial as she did at sentencing and had the defense known that Dr. Dixon would also so testify, they would not have objected to Dr. Dixon, for all three experts would then have given an earliest time of death at or later than 9:00 p.m. Thursday, which, in counsel's view, would have excluded appellant as the killer.

Judge Hinkel found no merit in that argument and denied the motion. First, he concluded that the revelation as to Dr. Korell's shifting opinions was not newly discovered evidence: counsel knew she had changed her view more than two weeks before trial. More important, he said that it would have made no difference to him, as the finder of fact, had Dr. Korell and Dr. Dixon testified at trial as they did at sentencing. That

would have placed the range of time of death back to 9:00 Thursday evening--only a few hours after appellant had the opportunity to commit the crime and within two hours after he was in possession of the victim's property. He stated that "there's so many other facts in this case and there's nothing certain about medical testimony of this sort." He concluded:

> "The State and the defense knew that, that the medical profession is not equipped or prepared to state with any degree of certainty, not even probability, it appears, as to matters of this nature. But all the other evidence in this case certainly was sufficient for me, at the guilt/innocence stage, and for the jury in the sentencing phase, to determine that Mr. Wiggins was a principal in the first degree."

These matters, as presented to the circuit court, were raised in appellant's direct appeal. As noted, he argued first that, because, in his view, his convictions rested solely on circumstantial evidence that permitted a reasonable hypothesis of innocence, they could not be sustained. Noting in particular Dr. Kauffman's testimony that Ms. Lacs likely died on September 17, appellant urged that it was possible that he broke into her apartment on the 15th and stole her credit cards and ring but did not kill her. We rejected that argument, concluding, in particular, "[t]hat the expert witnesses were either unable to agree, or differed as to the time of death, does not render clearly erroneous Judge Hinkel's ultimate finding that Wiggins robbed and murdered the victim on September 15." *Wiggins v. State, supra,* 324 Md. at 567, 597 A.2d at 1367. We also rejected his complaint about the denial of his motion for new trial, concluding (1) that, in light of Judge Hinkel's statements, both in announcing his verdict and in denying the motion for new trial, regarding the medical evidence, Dr. Korell's second revised opinion, if introduced at

trial, would not have produced a different result, and (2) that her changed testimony between trial and sentencing did not render the trial fundamentally unfair. At 324 Md. at 570, 597 A.2d at 1368, we concluded:

> "As the trial court noted, and the record indicates, medical testimony regarding time of death is fraught with uncertainty. Wiggins was aware that Dr. Korell changed her opinion once prior to the trial, and the defense had ample time to, and did, secure its own qualified expert testimony on this matter. As the ambivalence of the State's expert witness was known to the defense, her opinion at the sentencing hearing did not deprive Wiggins of a fair trial."

In January, 1993, appellant filed a petition for post-conviction relief, raising, as we said, 52 issues, several of which concerned, in one way or another, Dr. Korell's shifting views of when Ms. Lacs may have died. The only one we need be concerned with here is the argument that appellant is entitled to either a new trial or a new sentencing hearing "because his trial counsel provided ineffective assistance at the guilt phase of trial by failing to bring to light evidence of the State medical expert's prior inconsistent opinion, which dealt with the most crucial issue in [his] defense and which was consistent with the defense's theory." Specifically, he claims that counsel's failure to impeach Dr. Korell or to introduce evidence regarding her prior inconsistent statement fell below the bounds of reasonable professional conduct.

Three people testified at the post conviction hearing regarding the handling of Dr. Korell. Ms. Nethercott recounted her two conversations with Dr. Korell, testifying, in that regard, to what previously had been elicited in arguments on the motion to dismiss or narrow the indictment and the motion for

new trial. She added that the defense had previously retained Dr. Rudiger Breitenecker as an expert pathologist, that Dr. Breitenecker supported the defense theory that Ms. Lacs died after September 15, that when she was informed that Dr. Korell, whose initial opinion also supported that theory, had changed her opinion, she spoke with Dr. Breitenecker, who then advised that he was unwilling to testify. That combination--Dr. Korell's retraction and Dr. Breitenecker's unwillingness to testify--tore a major hole in the defense's case less than three weeks before trial. She finally was able to retain Dr. Kauffman to take the place of Dr. Breitenecker. She said that Dr. Korell did not give a good presentation at trial--that Dr. Korell had some difficulty with English and tended to be excitable. Ms. Nethercott discussed with Mr. Schlaich and with the District Public Defender, Mr. Saunders, whether she could or should testify regarding her conversations with Dr. Korell and whether, if she did, she would be able to continue as co-counsel. She determined, as a matter of strategy, to continue in the case, not to request a postponement, and not to testify about her conversations with Dr. Korell. Mr. Schlaich, she said (correctly), handled the cross-examination of Dr. Korell.

Mr. Schlaich had very little memory about the details concerning Dr. Korell. He recalled discussing with Ms. Nethercott whether she should testify and they decided that she should not do so. The major witness for appellant was a District of Columbia lawyer, Gerald Fisher, who had been involved at the post-conviction level and as co-counsel in a number of Maryland death penalty cases but had never tried one himself, either as to guilt/innocence or as to sentencing. He expressed the belief that Mr. Schlaich and Ms. Nethercott failed to give adequate representation in a number of respects. As to Dr. Korell, he opined that "their inability or their unwillingness to confront her with contradictory statements

which were crucial contradictory statements is ineffective without justification."

Judge Fader concluded that Mr. Schlaich and Ms. Nethercott "should have done something, as opposed to doing nothing, to have the impact of this inconsistent statement brought before the court," but found no prejudice. Apart from characterizing Mr. Fisher's proffer as to prejudice as "speculative," Judge Fader noted that the matter of Dr. Korell's inconsistent statement was brought to Judge Hinkel's attention and that he found the inconsistency irrelevant, and that it was brought to the jury's attention as well.

The standard to be applied in determining whether counsel's representation comported with the requirements of the Sixth Amendment is that enunciated in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see Lockhart v. Fretwell,* 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Oken v. State,* 343 Md. 256, 283, 681 A.2d 30, 43 (1996), *cert. denied,* 519 U.S. 1079, 117 S. Ct. 742, 136 L. Ed. 2d 681 (1997). To prove a claim of Constitutionally ineffective assistance of counsel, appellant must establish "that counsel's performance was deficient and that the deficient performance prejudiced the defense." *Oken, supra,* at 283, 681 A.2d at 43. To show a deficiency, appellant must (1) demonstrate that counsel's acts or omissions, given the circumstances, "fell below an objective standard of reasonableness considering prevailing professional norms," *id.,* and (2) overcome the presumption that the challenged conduct "be considered sound trial strategy." *Id.* To show that a deficiency prejudiced the defense, appellant must establish that counsel's error was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable," *id.* at 284, 681 A.2d at 43, quoting from *Lockhart v. Fretwell, supra,* 506 U.S. 364, 369,

113 S. Ct. 838, 842, 122 L. Ed. 2d 180, 189, quoting, in turn, from *Strickland, supra.*

Applying those standards, we find neither a Constitutional deficiency nor Constitutional prejudice in counsel's failure to cross-examine Dr. Korell (at trial or at the sentencing proceeding) or in the decision not to have Ms. Nethercott testify with regard to her conversation with Dr. Korell. Taking the second matter first, there is absolutely nothing in this record suggesting any need for Ms. Nethercott to have testified. There is no indication whatever that, had Dr. Korell been asked about the two conversations with Ms. Nethercott, or about her conversation with Dr. Dixon, she would have denied either the fact or the content of those conversations. Ms. Nethercott's concern in that regard has utterly no foundation and should never have been a factor in deciding whether to question Dr. Korell about the matter.

The question of whether Dr. Korell should have been cross-examined about her initial view and her change of opinion must be examined in context. Several considerations are relevant. Viewing the matter at the time of trial, it is clear that Judge Hinkel was fully aware of what had occurred. Without contradiction by the prosecutor, Mr. Schlaich had informed the judge at the hearing on the pre-trial motion to dismiss or narrow the indictment of the various conversations with Dr. Korell, and Ms. Nethercott reminded Judge Hinkel of that situation in her opening statement at trial. When Dr. Korell testified at trial, she gave a range of from 24 to 48 hours, but said that it was all guesswork and that a time of death could not be pinpointed. In Ms. Nethercott's uncontradicted view, Dr. Korell was not an effective witness; she did not make a good presentation.

More significant, perhaps, is the fact that Dr. Korell's trial testimony, giving a guesswork range of 24 to 48 hours, still put the earliest time of death at 9:00 Thursday evening--at least two hours *after* appellant was in possession of the victim's car, credit cards, and ring. Although that testimony was neither as firm nor as favorable to appellant as Dr. Korell's initial view, it still was more *exculpatory* than *inculpatory.* Both at the time of trial and at the time of the sentencing proceeding (1989), the law in Maryland was that a prior inconsistent statement by a witness, other than a party, was admissible only to impeach the witness's credibility, and not as substantive evidence. *See Ali v. State,* 314 Md. 295, 305, 550 A.2d 925, 930 (1988); *Sun Cab Co., Inc. v. Cusick,* 209 Md. 354, 361-62, 121 A.2d 188, 191 (1956). Not until *Nance v. State,* 331 Md. 549, 629 A.2d 633 (1993) was that rule relaxed to permit an inconsistent statement to be admitted as substantive evidence if the statement was reduced to writing and either signed or otherwise adopted by the witness. Thus, Dr. Korell's initial view, expressed *orally* to Ms. Nethercott, that Ms. Lacs had died no earlier than late afternoon on Friday could not have been used as substantive evidence as to time of death but only to impeach the credibility of her testimony that (1) death could have occurred 24 hours earlier, but (2) there was no sure way to tell. To have attempted to impeach that testimony by cross-examining her about her initial view would have permitted Dr. Korell to describe her conversation with Dr. Dixon, to have acknowledged that she was wrong in her initial view, and to have explained why she was wrong. It would have placed before Judge Hinkel no information of which he was not already aware, but may have allowed Dr. Korell to strengthen her resolve about the 48 hours, which would have created an even more dramatic conflict with Dr. Kauffman's opinion.

In announcing his verdict and in denying the motion for

new trial, Judge Hinkel said that he placed no weight on the medical testimony as to time of death.[10] We cannot imagine what additional benefit, as a practical matter, would have accrued to appellant from further impeachment of Dr. Korell. Failure to press the point already known to Judge Hinkel does not, in our view, overcome the presumption of sound trial strategy; nor can we conclude that, as a result of the omission, "the result of the proceeding was fundamentally unfair or unreliable."

We have the same view with respect to the sentencing proceeding. Had the matter been pursued, it would, at best, have brought into question the credibility of Dr. Korell's testimony that death could have occurred as early as 9:00 Thursday evening which, as noted, was more helpful than harmful to the defense. Moreover, Dr. Dixon, in giving a similar opinion, told the jury about her conversation with Dr. Korell, pointing out her disagreement with the time given on the death certificate. The jury had Dr. Comparini's testimony, as substantive evidence, and it also had before it the death certificate signed by Dr. Korell, listing the time of death as

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[10] Appellant contends that, had evidence of Dr. Korell's initial opinion been before Judge Hinkel, he might not have disregarded Dr. Kauffman's view that death occurred on Saturday, September 17. To a large extent, that assumes that Dr. Korell's initial opinion could have been used as substantive evidence for the proposition that it *is* possible to determine more precisely a time of death, which, as noted, is not the case. Moreover, it is clear from his remarks that Judge Hinkel was not relying on the more abstract question of whether it was possible to establish a time of death; he left in evidence that Dr. Korell could not, herself, testify, within a reasonable degree of medical certainty, the earliest time of death and simply did not credit Dr. Kauffman's opinion that death occurred on Saturday, September 17. Discrediting Dr. Korell's testimony regarding *her* inability to determine more precisely a time of death would not have enhanced the credibility of Dr. Kauffman's opinion.

Friday. Even if counsel's failure to cross-examine Dr. Korell at that proceeding could be regarded as deficient, there is utterly no basis for concluding that the result of the proceeding was fundamentally unfair or unreliable. The jury was fully aware of Dr. Korell's initial view, as noted on the death certificate, as well as her conversation with Dr. Dixon. It obviously rejected *all* of the medical testimony attempting to establish a time of death, the least favorable of which to appellant still put the earliest time of death at 9:00 Thursday evening.

Failure to Obtain Forensic Expert

As we indicated above, at some point counsel consulted Dr. Breitenecker as a forensic expert to render an opinion that Ms. Lacs died no earlier than Friday, September 16. Whether they actually had retained him to testify is not entirely clear. When Ms. Nethercott learned that Dr. Korell had changed her opinion as to the earliest time of death, she called Dr. Breitenecker, who informed her then that he was unwilling to testify. That was less than three weeks before trial. She or Mr. Schlaich was then able to retain Dr. Kauffman, but Kauffman was available only for a limited period of time. According to the evidence presented in this proceeding, if the case had been tried before a jury, he would have been unavailable, thereby leaving the defense without a forensic expert prepared to opine that Ms. Lacs died on or after Friday, September 16. That influenced Nethercott and Schlaich to recommend that appellant waive a jury and have the case tried before the court.

In his post conviction petition, appellant contended that, as a result of that situation, he was effectively coerced into waiving a jury and that the waiver was not a voluntary one. Judge Fader found no merit in that argument, and it is not

pursued in this appeal. The complaint here, which was also raised in the petition, is an off-shoot. Appellant contends that the choice, even if voluntarily made, was forced on him through the incompetence of counsel. The nature of that alleged incompetence is not entirely clear. It seems to rest on this statement from his expert, Mr. Fisher:

> "If indeed what was the reason for waiving was simply this whole problem with getting their experts available and being able to go forward, that I think falls below the standards of adequate professional conduct. . . . But they had alternatives to that. They could have sought a continuance; they could have done a number of things that would have taken the dilemma which had been created and set it aside. But they didn't do that.
>
> So if that was the motivating factor or the primary motivating factor in their decision to go judge versus jury then I think that that falls below the standards of competent assistance of counsel."

It does not appear that Mr. Fisher, or anyone else, has faulted counsel for the decision of Dr. Breitenecker not to testify, or for their decision to retain Dr. Kauffman, who gave very favorable testimony for appellant. As Fisher did not specify what other "number of things" counsel could have done, it seems that his criticism lies in their failure to seek a postponement of trial rather than recommend that appellant proceed with a court trial. As Judge Fader noted, however, appellant made clear, when questioned about his choice to proceed non-jury, that it was not based on the availability of Dr. Kauffman or anyone else, but rather on his concern that a jury might be "more likely to go with the State." Other than post-conviction afterthought, there is nothing in the record to

support the claim that counsel were deficient in their selection of experts or to require a conclusion that they improperly induced appellant into waiving a jury trial.

Jury Selection

In his petition for post conviction relief, appellant contended that there was a systematic exclusion of African-Americans from the jury selection process in Baltimore County. That claim was based largely on evidence that African-Americans comprise approximately 12% of the population of the county but that, at the time of his trial and sentencing, less than 6% of the venire panels were African-Americans. After taking a great deal of evidence regarding jury selection procedures in the county, Judge Fader rejected that claim, concluding that "Maryland's system of choosing jurors restricts no distinctive group from serving and favors no distinctive group to serve," and that "[n]othing Baltimore County, Maryland does deviates from the random selection system set up by the Maryland Legislature and included in the Maryland Code." See *Lovell v. State*, 347 Md. 623, 702 A.2d 261 (1997) and *State v. Calhoun*, 306 Md. 692, 511 A.2d 461 (1986), *cert. denied*, 480 U.S. 910, 107 S. Ct. 1339, 94 L. Ed. 2d 528 (1987), where we rejected similar challenges regarding selection procedures in Talbot and Montgomery Counties.

In this appeal, appellant has abandoned the argument made below but has recast it as a claim of ineffective assistance of counsel. He urges now that counsel failed to investigate or present evidence regarding jury selection procedures and failed as well to object to those procedures at the sentencing hearing. The fact is that counsel did object to the array, based on the fact that, of the 104 prospective jurors on the panel, only three were African-American. What counsel did not do was to produce

evidence of any systematic or unconstitutional exclusion. It is clear, however, that if counsel had done the same investigation undertaken by post-conviction counsel and produced the same evidence that they produced, in light of *Lovell* and *Calhoun* the objection would still have been properly sustained. We perceive no Constitutional prejudice to appellant from counsel's failure to pursue an unavailing defense.

Mitigating Evidence

In preparing and presenting appellant's case to the jury at sentencing, trial counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs, or at least at raising a reasonable doubt in that regard. They were, in effect, striving for "two bites at the apple." Notwithstanding that the jury would be, and was, instructed that appellant had been convicted of the crime, the jury still was required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer, and, given the entirely circumstantial nature of the State's evidence and the fact that there was some exculpatory evidence, counsel believed that appellant's best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency.

Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report prepared by the Division of Parole and Probation, which included some of appellant's social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation. He was aware that the jury could regard that background as a

mitigating factor. Indeed, as noted, one or more jurors did find appellant's "background" to be a mitigating factor, although not sufficient to outweigh the aggravating factor that they found. Mr. Schlaich understood that some lawyers use what he regarded as a "shotgun approach," attacking everything and hoping that " something sticks." He was not of that view, however, preferring to concentrate his defense. He did not, therefore, have any detailed background reports prepared, although funds may have been available for that purpose. He expressed some concern that that kind of information might prove counterproductive.

Appellant now claims that counsel's approach was a grievous error, of Constitutional dimension. Post-conviction counsel employed Hans Selvog, a Virginia social worker connected with the National Center on Institutions and Alternatives, to prepare a detailed psycho-social history of appellant, which, indeed, is tragic, rife with episodes of neglect and abuse. Appellant's legal expert, Mr. Fisher, then opined that "the use of an expert in the development of such material [is] ordinarily a minimum requirement for effective representation in a capital sentencing proceeding." On that premise, he concluded that, by failing to retain someone like Mr. Selvog to prepare a detailed psycho-social history and by failing to present information of that kind to the jury, trial counsel did not meet the minimum standards of the profession. Although he said that he had an opinion as to whether the presentation of a report like the one prepared by Mr. Selvog would have had an effect on the sentencing jury, Judge Fader would not let him render that opinion, finding it entirely too speculative. Nonetheless, appellant urges in his brief before us that there is a substantial or significant possibility that he was sentenced to death "because of his counsel's failure to investigate, develop, or present powerful mitigating evidence

of [appellant's] background and mental deficiencies."

Appellant cites a number of cases for the proposition that the failure to investigate and present available evidence of a mitigating factor may constitute ineffective assistance of counsel, arguing that the " Constitution imposes this virtually mandatory duty to investigate mitigating evidence." He asserts that the failure to marshal and present this evidence cannot be justified as a tactical decision, for if it was a tactical decision, "that decision was patently unreasonable." His view thus appears to be that, in every capital punishment case, it is mandatory for counsel to prepare and present to the sentencing tribunal any evidence that could be used by the tribunal to find a mitigating circumstance, and certainly any evidence of the defendant's abusive childhood. A dysfunctional background, while not one of the seven mitigating factors specifically listed in Article 27, § 413(g), may constitute a mitigating factor under the catchall in § 413(g) (8)-- "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." At least implicit in his argument, and really explicit, is the principle that counsel may not make the kind of tactical decision made in this case--to concentrate their defense and not employ a "shotgun approach," in the hope that "something sticks."

We reject the argument in the broad form that it is presented. In the first place, as noted, counsel *did* investigate and *were* aware of appellant's background. They did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State,* 331 Md. 651, 680-82, 629 A.2d 685, 700-02 (1993), *cert. denied,* 510 U.S. 1077, 114 S. Ct. 891, 127 L. Ed. 2d 84 (1994); *Burger v. Kemp,* 483 U.S. 776, 788-96, 107 S. Ct. 3114, 3122-26, 97 L. Ed. 2d 638, 653-58 (1987). More

important, counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing. Counsel is *not* required to present every conceivable mitigation defense if, after proper investigation and review, he or she concludes that it is not in the defendant's best interest to do so. *See Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir.), *cert. denied,* 493 U.S. 1011, 110 S. Ct. 573, 107 L. Ed. 2d 568 (1989) (attorney not obligated to present mitigating evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good).

The cases cited by appellant for his broad proposition that the failure of counsel to investigate or present mitigating evidence at a capital sentencing hearing constitutes ineffective assistance are all distinguishable. As a preliminary note, in all but one of them the sentencing tribunal, whether judge or jury, was the same tribunal that had determined guilt and thus had already considered and ruled upon the defendant's criminal agency. That is not, of course, a necessarily governing distinction, but it is a factor to consider. There is certainly less advantage to focusing the effort on retrying criminal agency before the very tribunal that has already determined it beyond a reasonable doubt, to the exclusion of other defenses going more directly to discretionary sentencing considerations, than in presenting and focusing upon that issue before a new, untainted tribunal. The cases cited are distinguishable for other reasons as well. In some of them, counsel made no investigation at all of any mitigating circumstances; in others, counsel failed to make a particular inquiry that would have produced significant, highly relevant mitigating evidence. Under the circumstances presented, that failure, the courts held, was not the product of a reasoned strategic decision but simply

deficient. *See, for example, Hill v. Lockhart,* 28 F.3d 832 (8th Cir. 1994), *cert. denied,* 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995) (no investigation of significant psychiatric history, including positive reaction to anti-psychotic medication); *Austin v. Bell,* 126 F.3d 843 (6th Cir. 1997), *cert. denied,* 523 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998) (no mitigation evidence presented; no investigation made of mitigating circumstances); *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995), *cert. denied,* 517 U.S. 1111, 116 S. Ct. 1335, 134 L. Ed. 2d 485 (1996) (no investigation into any mitigating evidence; decision made simply to beg for mercy); *Antwine v. Delo,* 54 F.3d 1357 (8th Cir. 1995), *cert. denied,* 516 U.S. 1067, 116 S. Ct. 753, 133 L. Ed. 2d 700 (1996) (failure to investigate defendant's mental condition at time of murder though aware of his odd behavior; defendant found to have bipolar disorder); *Baxter v. Thomas,* 45 F.3d 1501 (11th Cir. 1995), *cert. denied,* 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995) (no investigation of defendant's significant psychiatric history, including three-year commitment to State mental hospital, though counsel aware of odd behavior); *Com. v. Smith,* 544 Pa. 219, 675 A.2d 1221 (Pa.1996), *cert. denied,* 519 U.S. 1153, 117 S. Ct. 1090, 137 L. Ed. 2d 223 (1997) (failure to investigate defendant's mental state; defendant tortured to death five-month-old baby); *Hildwin v. Dugger,* 654 So.2d 107 (Fla.), *cert. denied,* 516 U.S. 965, 116 S. Ct. 420, 133 L. Ed. 2d 337 (1995) (failure to discover previous psychiatric hospitalizations and suicide attempts); *Rose v. State,* 675 So. 2d 567 (Fla. 1996) (no meaningful investigation of defendant's background; failure to discover evidence of organic brain damage and schizoid personality); *State v. Brooks,* 661 So. 2d 1333 (La. 1995) (failure to discover mental condition relevant to whether defendant under domination of homosexual lover); *People v. Ruiz,* 177 Ill. 2d 368, 226 Ill. Dec. 791, 686 N.E.2d 574 (Ill. 1997) (no investigation at all into defendant's

background); *People v. Howery,* 178 Ill. 2d 1, 227 Ill. Dec. 354, 687 N.E.2d 836 (Ill. 1997), *cert. denied,* 525 U.S. 828, 119 S. Ct. 77, 142 L. Ed. 2d 60 (1998) (failure to present evidence of defendant's significant contributions to community and civic involvement); *People v. Steidl,* 177 Ill. 2d 239, 226 Ill. Dec. 592, 685 N.E.2d 1335 (Ill. 1997) (no preparation at all for sentencing hearing).

The circumstances presented in those cases, and others like them, are not at all what we have here. Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor--the uncontested fact that appellant had not previously been convicted of a violent crime--should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant's unfortunate childhood. As Mr. Schlaich noted, the dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods. Appellant's attack runs afoul of the principle set forth in *Strickland,* 466 U.S. at 688-89, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95, applied by us in *State v. Thomas,* 325 Md. 160, 171, 599 A.2d 1171, 1176 (1992), *cert. denied,* 508 U.S. 917, 113 S. Ct. 2359, 124 L. Ed. 2d 266 (1993), and *Oken v. State, supra,* 343 Md. 256, 283-84, 681 A.2d 30, 43:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

Alleged Agreement With Geraldine Armstrong

"[I]n order to preserve the issue for any future review," appellant contends that the State failed to disclose an agreement to treat his girlfriend, Geraldine Armstrong, leniently. Armstrong was arrested with appellant and was initially charged with felony murder, theft, and fraud, the belief being that she was in complicity with appellant in the robbery and murder of Ms. Lacs. The charges against her were eventually dropped, and she testified for the State against appellant. From those circumstances, appellant claims that "there is a significant possibility that Ms. Armstrong received assurances of leniency in exchange for her testimony" that were not disclosed to appellant. No evidence of any such assurances was presented. Both the prosecutor and Ms. Armstrong denied that any agreement or assurances existed, and Judge Fader found as a fact that there was no basis for the allegation. That finding is not clearly erroneous.

Sufficiency of Evidence

Also "to preserve the issue for any future review," appellant urges that no reasonable fact finder could have found

him guilty beyond a reasonable doubt either at trial or at the sentencing proceeding. That question was litigated and resolved by us in appellant's direct appeal. We held that the evidence did suffice to sustain the conviction and the sentence, and we shall not revisit that issue in a post conviction proceeding. Md. Code, Article 27, § 645A(b).

ORDER DENYING PETITION FOR POST CONVICTION RELIEF AFFIRMED, WITH COSTS.

Dissenting opinion by ELDRIDGE, J., in which BELL, C.J., joins.

ELDRIDGE, Judge, dissenting.

Under the Maryland death penalty statute, with one exception not pertinent to this case, "only a principal in the first degree" to murder in the first degree is eligible for a death sentence. The State, at the sentencing stage of the trial, must prove beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. *See* Maryland Code (1957, 1996 Repl. Vol.), Art. 27, § 413(e)(1); Maryland Rule 4-343(g); *Wiggins v. State,* 324 Md. 551, 570-571, 597 A.2d 1359, 1368 (1991), *cert. denied,* 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992); *Johnson v. State,* 303 Md. 487, 510, 495 A.2d 1, 12 (1985), *cert. denied,* 474 U.S. 1093, 106 S. Ct. 868, 88 L. Ed. 2d 907 (1986); *Stebbing v. State,* 299 Md. 331, 371, 473 A.2d 903, 923, *cert. denied,* 469 U.S. 900, 105 S. Ct. 276, 83 L. Ed. 2d 212 (1984).

When this case was before us on direct appeal, Judge Cole and I dissented from the affirmance of the death penalty on the ground that the evidence at the sentencing hearing was insufficient, under the due process standard set forth in *Jackson*

v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2788- 2789, 61 L. Ed. 2d 560, 573 (1979), for the jury to find, beyond a reasonable doubt, that Kevin Wiggins was a principal in the first degree to the murder of Florence Lacs. *Wiggins v. State, supra,* 324 Md. at 583-588, 597 A.2d at 1374-1377 (Judges Eldridge and Cole dissenting). While observing that the State's evidence "may have been sufficient to establish that Wiggins was involved in the robbery of Ms. Lacs, it was not sufficient to show, beyond a reasonable doubt, that Wiggins was the actual perpetrator of the murder." 324 Md. at 585, 597 A.2d at 1375. The dissenting opinion on direct appeal reviewed the State's extremely weak circumstantial evidence, the lack of evidence showing that the victim died at about the time Wiggins was seen in the vicinity of the victim's apartment, the time sequence problem with the State's case, the evidence conflicting with the State's theory of the case, the lack of any evidence that Wiggins had been in the victim's apartment, and the evidence suggesting that someone else had been in the apartment at the critical time and had been involved in the robbery/murder.

As the evidence and the weakness in the State's case were extensively reviewed in the dissenting opinion on direct appeal, I shall not repeat that review today. For the reasons set forth in that dissenting opinion, I adhere to the view that the evidence was utterly insufficient to show that Wiggins was the actual perpetrator of the murder. Consequently, as a matter of Maryland law, he is not eligible for the death penalty. The maximum punishment which may legally be imposed upon Wiggins is life imprisonment. Code (1957, 1996 Rep. Vol.), Art. 27, § 412(b).

The majority today does not discuss this issue, presumably because it was litigated on direct appeal and because the

Maryland Post Conviction Procedure Act, Code (1957, 1996 Repl.Vol.), Art. 27, § 645 A(a), ordinarily is not a vehicle for relief based on an issue which has "been previously and finally litigated. . . ."

Nevertheless, this issue directly concerns the legality of Wiggins's sentence. An issue concerning the legality of the sentence imposed is not "finally" litigated when decided on direct appeal because, under Maryland law, a "court may correct an illegal sentence at any time." Maryland Rule 4-345(a). As stated by the Court in *State v. Griffiths,* 338 Md. 485, 496, 659 A.2d 876, 882 (1995), "[t]his Rule creates a limited exception to the general rule of finality, and sanctions a method of opening a judgment otherwise final and beyond the reach of the court." The Court in *Griffiths* went on to point out that "Rule 4-345(a) does not preclude action by the trial court on its own initiative, and we have in the past *ex mero motu* directed the trial court to correct an illegal sentence upon remand." *Ibid.*

Since Wiggins was not shown to be a principal in the first degree, the death sentence is an illegal sentence under Maryland law. Furthermore, the imposition of a death sentence, in light of the evidence, is a denial of due process under *Jackson v. Virginia, supra.* I would remand this case to the circuit court with directions to impose a sentence of life imprisonment.

Chief Judge BELL concurs in this dissenting opinion.

Appendix F

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
V.		
	*	FOR
KEVIN WIGGINS	*	BALTIMORE COUNTY
	*	Case No: 88-CR-5464

* * * * * * * * * * * * * *

JUDGMENT AND OPINION
DENYING POST CONVICTION RELIEF

Upon hearing, presentation of evidence, argument and extensive review of the trial record, it is ORDERED by the Circuit Court for Baltimore County this 20th day of October, 1997 that the petition for post conviction relief filed by Kevin Wiggins (Wiggins or Petitioner) is DENIED.[1]

Petitioner alleged thirty eight (38) separate grounds, some with subparts for a total of fifty-one (52) issues, each of which he argues entitle him to post conviction relief.

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[1] Maryland Rules of Procedure governing post-conviction relief are now contained in Rules 4-401, et. seq. Previously, these provisions were found in the "BK" Maryland rules.

36. THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF THE PROCEEDINGS IN THAT:

A. COUNSEL FAILED TO INTRODUCE EVIDENCE SHOWING THE PETITIONER WAS MENTALLY ILL, HOMELESS AND A VICTIM OF A HORRIBLE CHILDHOOD.

B. COUNSEL FAILED TO CONDUCT ADEQUATE INVESTIGATION OF THE CASE TO DEVELOP EVIDENCE OF MENTAL RETARDATION, THE HOMELESS LIVING CONDITION OF THE PETITIONER AND HIS HORRIBLE CHILDHOOD.

C. COUNSEL FAILED TO INTRODUCE AVAILABLE EXPERT TESTIMONY ON THE ISSUES OF MENTAL RETARDATION, HOMELESSNESS AND HORRIBLE CHILDHOOD OF THE PETITIONER.

The contention

Wiggins emphasizes the importance of presenting mitigating evidence at sentencing. He says that no less a source than the U.S. Supreme court has often acknowledged a defendant's compelling interest in putting such evidence before the sentencer and cites: *Lockett v. Ohio*, 438 U.S. 586, 602-06 (1978); *Eddings v. Oklahoma*, 435 U.S. 104 (1982) and *Penry v. Lynaugh*, 492 U.S. 302 (1989). Further, he states that the Supreme Court has explained why mitigating evidence of a disadvantaged childhood and/or emotional and mental problems play such a unique role in a capital jury's

deliberations:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who has no such excuse. *California v. Brown*, 479 U.S. 538, 545, 93 L. Ed.2d 934, 107 S. Ct. 837 (1987) (O'Connor, J. concurring). . . Only [after the sentencer has been able to consider mitigating evidence] can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S. at 304-305, 49 L.Ed.2d 944, 96 S.Ct. 2978. "Thus, the sentence imposed at the penalty state should reflect a reasoned *moral* response to the defendant's background, character and crime." *California v. Brown*, *supra*, at 545, 93 L.Ed.2d 934) (O'Connor, J., concurring) (emphasis in original).

Penry, 492 U.S. at 319.

Wiggins also quotes the Court of Appeals opinion in *Woods v. State*, 315 Md. 591, 556 A.2d 236, 242 (1989):

> "[The sentencer's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment *after the issue of guilt has been determined*. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the

defendant's life and characteristics."

Petitioner argues that most notable among the duties of trial counsel at sentencing is to make a reasonable decision that makes particular investigations unnecessary and cites *State v. Tichnell*, 306 Md. 428, 509 A.2d 1179 (1986). Other cases cited as to the responsibility to investigate are: *State v. Thomas*, 328 Md. 541, 616 A.2d 365 (1992); *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990), *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *Coleman v. Brown*, 802 F.2d 1227, 1233 (10th Cir. 1986); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991) (consideration of factors that might evoke mercy); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (mental retardation); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988) (failure to uncover mitigating family background witnesses and medical history when both were available); *Proffitt v. Waldon*, 831 F.2d 1245, 1248 (5th Cir. 1987) (failure to present mental history); *State v. Savage*, 577 A,2d 455 (N.J. 1990); *People v. Ledesma*, 729 P.2d 871 (Cal. 1987) and *People v. Mozingo*, 671 P.2d 363 (Cal. 1983).[258]

Further, Wiggins cites *Brown v. Dixon*, 891 F.2d 490, 500 (4th Cir. 1989) as to the difference between the sentencing phase and the guilt/innocence phase of a trial.

> As far as the [sentencing] jury was concerned, [the] client was no longer the presumed innocent [client] of the guilt phase, but the guilty [client], [his] own views on the matter notwithstanding. For [counsel] to have ignored this cardinal reality would have been to ignore

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[258] Part of this allegation comes from pp. 12-13 of Wiggins' pre-trial memorandum.

> the essence of the adversarial penalty proceeding, in which the only issue is the fate of a guilty defendant.

Presentence Report

A presentence report was done on Wiggins. As to background, it states the following:

PERSONAL HISTORY

> The defendant reports little contact with his natural parents and he spent most of his life in foster care. He estimates he lived in seven or eight different homes, the longest period of which was with a woman who is now deceased. He describes his background as generally "disgusting," but he believes, somehow he "will get it together." He notes that he has lived on the streets since he was sixteen, although occasionally he was able to rent a room. He speaks highly of his half-sister, Charlene, who reportedly shared some of his misery as a youth and they have maintained contact during his period of confinement.
>
> Ms. Charlene Wiggins was interviewed on 7/23/89 and she confirmed that she and the defendant were raised together in foster care. However, she reports that they lived in only three homes, the longest of which was nearly ten years, and, although somehow strict, the last foster mother, Mrs. Lenore Miner, provided "a nice home with a roof over our heads." . . . She also reports that his natural mother, who has had no contact with him, is an alcoholic, but she has no information on his natural father. She also is unaware of any substance abuse history or psychiatric

intervention.

HEALTH (physical and mental)

The defendant describes his health as "excellent" and there are no problems at this time.

The defendant recalls being taken to a counselor when he was age ten for what he describes as "confusion," but he recalls being told that "nothing was wrong." Since then, there have been bouts of depression, which have become more frequent since he has been confined, but he notes that he recently found some degree of tranquility through religion. There is no psychiatric report in the jail file, notwithstanding the reported suicide attempts, and he denies ever being evaluated or treated by a psychiatrist. He does not, however, that a preacher visited him on three occasions but complained on the last visit that the defendant was keeping him from a tennis match.[259]

Trial Counsel

The Wiggins defense team did not have a forensic social worker to do a social history on Wiggins in preparation for sentencing. No social worker, psychologist or psychiatrist testified for Wiggins.

Defense counsel Schlaich said that he had seen cases where a social worker, psychologist or psychiatrist had testified

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[259] The date of the report is 7/28/89. The report is part of the court file. It is sealed, but this court could not find it had been assigned any exhibit number.

and that testimony had backfired. Through cross-examination of the witness at trial, more bad about the defendant had been developed. He testified that on cross examination of these witnesses there were questions asked and answers given that could be construed as seeing the Defendant as a dangerous person and as giving reasons why the jury should not be merciful.[260] There was a PSI done in this case and Schlaich supplied information to the writer of that report.[261]

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[260] P.C. Transcript, 3/28/94, p. 58.

[261] Schlaich had more information than appeared in the PSI report. At the hearing he was questioned by the Wiggins' post conviction attorney:

Q: But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?

A: I believe that we tracked all of that down.

Q: You got the Social Service records?

A: That is what I recall.

Q: That was in the Social Service Records?

A: Yes.

Q: You also knew that there were reports of sexual abuse at one of his foster homes?

A: Yes.

Q: You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?

A: Yes.

Q: you also knew about homosexual overtures made toward him by his Job Corp supervisor?

A: Yes.

Q: And you also knew that he was borderline mentally retarded?

A: Yes.

Q: You knew all --

A: At least I knew that as it was reported in other people's reports yes.

Q: But you knew it?

A: Yes.

Q: And you knew all of those things and you did not retain a forensic social worker to do a social history?

A: As I recall that is correct.

Nethercott testified that Wiggins had cognitive limitations.

Schlaich testified that he had attended Public Defender sponsored seminars while with that office, including one that included a topic on forensic experts. He knew The National Center for Institutional Alternatives as a place he had used in the past in some cases in an attempt to establish mitigation and to find places short of incarceration with recommendations for treatment centers. He had not used them in a capital proceeding. He did not ask that the services of a forensic social worker be obtained to do a social history on the Petitioner. When questioned by post-conviction counsel concerning the holding of certain Supreme Court case names involving mitigation factors, he was uncertain of the specific holding of any of those cases. Schlaich did say that low intelligence and sexual abuse of the defendant could be mitigating circumstances in a capital case.

Trial tactics meant that Schlaich wanted to two shots at the issue of whether Wiggins was a principal in the first degree, In his opinion this was a "reasonable doubt" case on the question of time of murder and the ability of the State to place Wiggins at the scene at the time of the murder.[262]

(P.C. Transcript, 1/28/94, pp. 33-34.)

[262] P.C. Transcript, 3/28/94, pp. 55-56. Questioning of Carl Schlaich:

Q: Okay. Did you bring with you to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury?

A: It is not experience because I don't do that. I try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to do after that point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish

Doering v. State was another death penalty case in which Schlaich participated. That involved the death of an elderly person. Doering introduced numerous mitigating circumstances including testimony by a psychiatrist and psychologist, and the fact that Doering had been sexually abused as a child and was in foster care. The jury verdict was death.[263]

The Selvog Report

Hans Selvog, a licensed (licensed in D.C. and Virginia, not in Maryland) Clinical Social worker with the National Center on Institutions and Alternatives testified at the post conviction hearing.[264] The Center is a private nonprofit agency providing direct services to both the criminal justice and mental health

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with it.

Q: And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?

A: Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.

Q: And what did you think of that as a tactical position to take?

A: It is a difficult position to take. There are things done to try to negate some of the bizarre appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like -- try to remove some of that taint of conflicting story there.

But it seems to me if you can get away without doing it, it would be better.

[263] P.C. Transcript 3/28/94, pp. 52-53.

[264] Mr. Selvog is a Virginia Resident, a Licensed Social Worker since 1990 (Bachelor's Degree, 1976 from Bethel College in Saint Paul; Graduate Degree, 1986 from Virginia Commonwealth University and is employed as a primary therapist doing a number of forensic assessments. His resume was introduced as PC-I. He testified that in Virginia a social worker can diagnose a mental disorder. He was not called upon to express a psychological or psychiatric opinion in the Wiggins case. (P.C. Transcript, 1/7/94, pp. 40-44).

systems, including social histories in capital cases and to acting as a clearing house in mitigation development in capital murder cases. He prepared and produced a document, "Chronological Merit of Kevin Wiggins Social History.[265] Part of this document was prepared through an interview with Wiggins, his mother, 3 sisters, maternal aunt, maternal cousins, and upon a review of his foster care, medical and school records.[266]

Selvog testified at length that Wiggins bore psychological and abuse scars into adulthood as he had suffered from neglect and abandonment in childhood. Wiggins had difficulty distinguishing fantasy with reality and had a poor memory.[267]

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[265] Introduced as PC-2.

[266] P.C. Transcript, 1/7/94. p. 50.

[267] Much of this testimony and the summary prepared referred to newspaper and other articles and concern about attitudes and the affect on an individual's life, when that individual has experienced sexual abuse. The summary contained opinions from physicians and others. Selvog stated, "therapy that goes on between client and patient is very similar fundamentally among social workers, psychologists and psychiatrists.

As found by Selvog. See P.C. Transcript 1/7/94:

Born on 9/2/61, Wiggins was said to be the product of an extra marital affair. He did not know his father. History showed that his mother was often in a drunken state and that Wiggins and other children in the family were witnesses to his mother having sex with other men. The children sometimes went hungry and were physically abused. At one time, Wiggins' hands were burned requiring emergency foster care. At one time he was tested to have an I.Q. of 72.

Experience by the Petitioner with foster care was very bad. It consisted of physical abuse and a foster parent sexually active with him and other children in the household. It was opined that he was starved for affection and needed attention. Other foster placement showed he was reported to exhibit bizarre behavior (sleeping on the floor, refusal of medical attention for a sore throat), and at times he was sexually molested. A report made when he was in the 11th grade by an individual with a Master's Degree in Nursing was that he exhibit bizarre, sometimes infantile and hostile

As regards the Petitioner and his background, Selvog stated: "the effects of that sort of abuse and experiences of neglect cause these sort of behavior problems and emotional problems that Kevin exhibited throughout his life."[268] Additionally, Selvog testified that Wiggins experienced "extreme signs of depression. He exhibits Suicide ideation." Aggressiveness is a frequent symptom of someone who experiences physical and

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behavior. When Wiggins enlisted in the Job Corp, he was sexually molested there, pp. 52, 56-62, 64-78, 79-83. Two particular opinions given by Mr. Selvog bear repeating:

Q. Okay. And what was Kevin's reaction to those beatings?

A. Well, they were very painful. They left him confused, they left him frightened constantly. In that type of environment where you have chronic alcoholic parent, caregiver, the environment is unpredictable; the environment is hostile. So there is constant fear. The effect and the symptoms of which Kevln reports and the sisters report is finding ways to deal with that sort of trauma by blanking out, actually a number of defenses, but blanking out, trying not to feel, trying not to think about anything; sort of depersonalization sort of experiences by looking on these past memories of the abuse as they were occurring or after they occurred as happening to someone else; being -- trying to avoid the feelings of those experiences by -- in one instance in particular Kevin wanted to fly, fly out the window to be free and his sisters had to hold him back. Pp. 62-63.

* * *

Q. What did Lawrence Hines conclude from that evaluation? (the Master's Degree Nurse)

A. Well, he referred to the strange and bizarre behavior of Kevin, being infantile at times, hostile at others. His inability to remain oriented to time. place and person. His history of forgetting things and causing problems in the foster home. His limited intellectual capacity.

And his impression was that Kevin was suffered with mental retardation with cranial pathology and he suggested a physical exam and brain scan. He noted a question of head trauma in Kevin's record. pp. 78-79.

[268] In the opinion of Mr. Selvog, those problems were:

Inability to form attachments. Emotionally shut down and numb, depersonalized, disassociated in terms of not being able to integrate memory, memory identity, consciousness from time to time, which goes to the observation of Kevin as being disoriented to reality. p. 81.

sexual abuse."[269]

In Maryland, a social worker's practice, as defined by the Health Occupations Code, Title 19. H.O. § 19-101, the Definitions Section states:

> (e) *Practice social work.*- "Practice social work" means to engage professionally and for compensation in the following activities while representing oneself to be a social worker:
> (1) Helping individuals, groups, or communities to enhance or restore their capacity for social functioning;
> (2) Seeking to create societal conditions favorable to this goal; and
> (3) By the application of social work values, principles, and techniques:
> (i) Helping people obtain tangible services;
> (ii) Helping persons, communities, and groups provide or improve social and health services; and
> (iii) Counseling with individuals, families, and groups.
> (f) *Practice clinical social work.*-
> (1) "Practice clinical social work" means to engage

[269] Selvog did not know whether the sexual abuse had been reported to authorities. Pp. 89- 90. On cross-examination, the State pointed out some inconsistencies that Wiggins gave to these findings when compared to the presentence report. There, Wiggins had said that his foster mother provided a nice home over the heads of the children. None of the persons alleged to have committed the sex abuse were interviewed because they could not be located. He had not reviewed the Petitioner's criminal record. He admitted that until Petitioner told him about the sexual abuse, not a single report by any other health care professional reported the abuse. Nor was there a mention of abuse against Wiggins in any report of the DSS. Selvog said that the majority of instances of sex abuse are not reported by a victim when the abuse is by a caretaker. pp. 90-93.

> professionally and for compensation in the application of social work principles and methods for the alleviation of social, mental, and emotional conditions through treatment designed to provide psychotherapy for a mental disorder.
> (2) "Practice clinical social work" includes rendering a diagnosis based on a recognized manual of mental and emotional disorders.
> (g) *Social worker.*- "Social worker" means an individual who practices social work.[270]

Once a physician has seen the patient and referred the patient to a clinical social worker, the social worker may make a diagnosis of the person's social, mental, or emotional disorder and may use whatever diagnostic coding is appropriate for the patient's medical records and for insurance reimbursement purposes. 73 Op. Att'y Gem 208 (1988).

There was an objection by the State to much of the testimony that Selvog had to offer. As counsel and the court went through the various questions asked and information furnished, it must be kept in mind that Mr. Selvog is a social

[270] From: HO 19-101:
A license to practice may include a number of individuals:
(c) *License.*-
(1) "License" means, unless the context requires otherwise, a license issued by the Board to practice social work.
(2) "License" includes:
(i) 1. A certified social worker license: or
2. A certified social worker-clinical license;
(ii) Graduate social worker license; and
(iii) A social work associate license.
(d) *Licensed social worker.*- "Licensed social worker" means, unless the context requires otherwise, a social worker who is licensed by the Board to practice social work.

worker. He is not a psychologist, psychiatrist or a medical doctor. He said he was qualified to give a number of different opinions, some of which were allowed by this court and some of which were not. It must be kept in mind throughout all of this that Mr. Selvog, as is the nature of his profession, gives information from reports of others. Some of those reports contain what is classified as professional opinion, which opinion comes from an individual not in court, and not able to be cross examined. Therefore, questions and objections were considered on a question by question basis at the hearing.[271]

In *Booth v. State*, 312 Md. 266, 276, 608 A.2d 162 (1992), a social worker testified as an expert on the "psychosocial assessments and the impact of a person's immediate family and immediate environment on his or her psychosocial development." *Id.*, at 187.[272] in *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988), testimony by a social worker for the State were excluded. Testimony amounted to nothing more than a statement by the social worker that the Defendant was telling the truth. *Id.*, at 277.[273]

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[271] P.C. Transcript, 1/7/94, pp. 46-47, 53-55.

[272] The Opinion by the *Booth* Court shows that the trial judge did certify the witness and said he would permit her to answer some questions, maybe not others depending on the individual question. Obviously concerned over whether the background, training and experience of this social worker would allow her to express all the opinions for which she was produced, the trial judge handled the questions one at a time. This procedure was approved by the Court. The opinion states: "Ms. Alphonso went on to give an opinion concerning how Booth's family life and environment had affected him." *Id.*, at 187-89.

[273] The social worker was called by the State to give expert testimony on the issue of sexual abuse of a child. She had done no objective test. The *Bohnert* Court stated that when the testimony is the functional equivalent of a statement by the witness that what she was told is the truth, that is an invasion of the prerogative of the jury and cannot be the subject matter of

Expert testimony on Ineffective Assistance

Gerald Fisher, Esq., a criminal law practitioner was produced as an expert to testify on the issue of ineffectiveness of counsel. He said that the background information on Wiggins presented by Selvog would not have gone to the detriment of Wiggins. The murder was not one where there was a wild crazy bludgeoning or wild sexual attack. The State reminded him that the victim (Lachs) was an elderly woman, had been drowned in a bathtub, was found not to be wearing underpants, her skirt was up around her waist and black flag & top job had been dumped on her. Fisher responded that while there was no question that jurors would wonder why this happened that overall the background would not work to Petitioner's detriment.[274]

On cross-examination, Fisher stated he knew that the record showed that trial counsel was probably preparing to introduce psychological evidence and DSS evidence had the trial court granted a bifurcated trial separating out the issue of principal in the first degree from other issues. That request for bifurcation was denied by the trial judge.[275]

From Fisher's testimony at the post conviction hearing on the "minimum requirements for effective representation in capital sentencing":

> I think you start at the beginning, which is you first have to go to the Statute and you have to look at whatever statute you are operating under, whether it is

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expert testimony. Id., at 271, 272, 277.

[274] P.C. Transcript, 3/29/94, pp. 80-82.

[275] P.C. Transcript, 3/29/94, pp. 86-89.

Maryland's or elsewhere, to see what the aggravators are and what the mitigators are that are statutorily prescribed. You start thinking about how you are going to try to either undercut the aggravators or to put on evidence in support of the statutory mitigating circumstances.

Then what you need to start doing is to do a complete comprehensive background on the client so that you can not only address those issues but that you can also present additional evidence on what are commonly called non statutory mitigating evidence, things for example under the Maryland statute where the jury either individually or unanimously may be able to say we find the following information to be mitigating and would enter it into the weighing process.

That requires I think at a very minimum is you do a comprehensive psycho-social history on your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive work up of the client. That means not just talking to the client but talking to family members, talking --- going back through all of their social files, juvenile files, criminal records, whatever other files may exist, subpoenaing those records, collecting them.

You try to get everything you possibly can about the client's background to start examining that and developing that for a competent presentation at a sentencing hearing should you ever be there.[276]

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[276] P.C. Transcript of 3/29/94 at pp. 28-29.

Fisher explained that the use of this forensic expert in the development of such material is a minimum requirement for effective representation in a capital sentencing proceeding:

> In capital cases you have to go further . . . and you have to be trained to do it. Most of the people you encounter when you get into these very difficult issues such as abuse, neglect, sexual abuse, other sort of things, the client, the family, other individuals are very resistant to providing information, particularly at the outset. That needs to be developed. You have to have somebody who knows how to delve into that information, how to bring it out, how to look at records and so forth and understand what that means.
>
> I as an attorney can look at a social file on a client. What I mean by social file is a file that might be created when he is a juvenile. I may see certain things. A person who has expertise in this area will look at it and see it at many different layers than I will. They will know how this information came about and they will know that there is more out there.
>
> For me it will be a conclusion. For them it will be a clue. They will take that and go further. That is why you need to have these people who do that and that is what they do and they do it extremely well.[277]

Fisher's opinion was that trial counsel for Wiggins did not meet the minimum standards of the profession overall and in specific matters. As to mitigating evidence:

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[277] P.C. Transcript, 3/29/94, pp. 29-30.

In particular, the things that come to mind is first of all the whole question of their investigation, presentation of mitigating evidence. They simply did not do what is necessary in order to have presented that properly to the Court, to the jury on behalf of their client.

I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into those various problems that he had. And then they didn't present--- I have read this report by Dr. Selvog. **I must say that in terms of Mr. Wiggins background, that the deprivations and neglect he suffered are — they may not be the strongest I have every see, but it is among the strongest I have ever seen. I have seen dozens of background that have been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.**

It certainly does not impress me as being any kind of sound strategic decision to get there. There doesn't seem to be an excuse for them either not having gone out and put it together, because it was --- much of it was there for the taking. And then not presenting it just makes it, it just makes no sense to me, frankly.[278] [Emphasis by bold]

It was Fisher's information that the Maryland Public Defender's office routinely hires experts to do these psycho-social histories, conferences were being held to

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[278] P.C. Transcript, 3/29/94, pp. 32-33.

development of this information as the death penalty law was revived and Schlaich testified that he had attended such a conference.[279] When asked to express an opinion as to whether the failure to present this information had a prejudicial effect on the verdict of the jury, an objection was made and it was sustained. It was this court's opinion now, as it was then, that no adequate basis existed for Mr. Fisher to express that opinion. A guess and speculation is what is attendant to any opinion he would express -- nothing more.[280]

Fisher had reviewed the Seltzer jury composition report (PC 4) and the social history on Wiggins. (PC 2) He stated he was familiar with the family history presented, with the norms and standards expected of a reasonably competent defense attorney in preparation of the mitigation stage in a death penalty case. He said that this did not vary from jurisdiction to jurisdiction as to the type of information contained in PC 2.

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[279] P.C. Transcript, 3/29/94, pp. 33-34.

[280] P.C. Transcript, 3/29/94, pp. 38-39. A proffer was made for appellate court purposes: I think that there is and, in using the standards of Strickland, more than a substantial probability that this failure to present evidence effected the outcome of the sentencing hearing m this case. *Id.*, at 39.

The undersigned judge does not wish to be discourteous to Mr. Fisher. For more than fifteen (15) years I have been presiding over jury trials in Baltimore County, both in criminal and civil litigation, My best guess, knowing the community and with having tried five (5) death penalty cases is that no one can say for sure that the presentation of this evidence worked up by Dr. Selvog would have had any affect the outcome of this sentencing proceeding. I expect the appellate court to give absolutely no value to this guess. Schlaich said it best when he showed apprehension over the introduction of this evidence in a case, where the crime was heinous and where nothing existed to show background would have caused a reflex action on Wiggins' behalf and that the evidence should be suspect at best.

The Selvog report contains the type of mitigating information that is required in death penalty cases.[281] Selvog expressed the opinion that trial counsel did not do a job that met the minimum qualifications of the profession in the preparation and presentation of mitigating evidence.[282] Stating that while the deprivations and neglect Wiggins suffered were not the strongest he had seen, they were among the worst and that the presentation of this history and background should have been presented to the jury.[283] Some Public Defender offices have someone on staff to properly prepare the report. The Maryland Public Defender routinely hires people to do these studies. It was the normal standard to do this preparation in a capital sentencing case.[284]

An important part of the Fisher presentation occurred when he tried to express an expert opinion as to the effect of not presenting this information during the Wiggins case. For appellate court purposes, not for evidence at the hearing he expressed an opinion that there was "more than a substantial

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[281] P.C. Transcript, 3/30/94, page 44.

[282] P.C. Transcript, 3/30/94, page 42.

[283] At the basis of the Fisher opinion, was the numerous seminars he attended and his research on capital issues and by talking to mitigation specialists. First, the statutory aggravating factors and the mitigators have to be analyzed so they may be placed in perspective. This has to be done by someone qualified to do this report. This is a minimum requirement. A complete comprehensive background on the client the needs to be done, including a psycho-social history by someone experienced in doing the comprehensive work. This includes talking to fatuity, going back through social files, juvenile and criminal records, etc., so that everything may be obtained to develop a competent presentation at sentencing. The one who does the report needs to be trained so information may be obtained from some individuals who are often resistant to give information on the neglect and abuse issues.

[284] P.C. Transcript, 3/29/94, p. 34.

probability that this failure to present evidence effected the outcome of" the sentencing hearing in the case." Because the analysis here was only as a result of a two (2) case comparison and otherwise there was an insufficient basis for the opinion to be expressed, this court at postconviction would not allow this testimony.

> Q: Mr. Fisher, could you give us your opinion, your expert opinion on what the minimum requirements for effective representation in capital sentencing are?
> A: . . . [Y]o have to go to the Statute . . . To see what the aggravators are and what the mitigators are that are statutorily prescribed . . .
>
> Then what you need to start doing is to do a complete comprehensive background on the client so that you can not only address issues but you can also present additional evidence on what are commonly called non statutory mitigating evidence . . .
>
> This requires I think that at a very minimum you do a comprehensive psycho-social history of your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive work up of the client. That means not just talking to the client but talking to family members, talking -- going back through all of their social files, juvenile files, criminal records, whatever other files may exist . . .[285]
>
> Q: . . . In your expert opinion is the use of an expert in the development of such material ordinarily a minimum requirement for effective representation in

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[285] P.C. Transcript, 3/30/96, pp. 28-29.

a capital sentencing proceeding?

A: Yes

A: . . . In the normal criminal case if you are trying to put on sentencing information on behalf of your client . . .

In capital cases you have to do further than that and you have to be trained to do it.[286]

. . . I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into these various problems that he had. And then they didn't present --- I have read this report by Dr. Selvog. I must say that in terms of Mr. Wiggins background that have been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.[287]

When Mr. Fisher was asked what the likely impact of the failure to develop this evidence was on the jury verdict in the *Wiggins* case, the State objected and the court sustained the objection. The undersigned judge was emphatic in determining that the basis for the expression of an opinion was wanting:

> THE COURT: I can only say in my experience of sixteen years on this bench if this fellow was allowed to express the opinion on the meager little evidence

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[286] *Id.*, at 29.

[287] *Id.*, at 32-33.

> that he has presented to us as far as comparison is concerned, then anyone should be able to express an opinion on almost everything.
>
> With that, I'm in the business of reading juries and judges and knowing. He certainly does not have an adequate basis to express that opinion. I will allow you to proffer it for appellate court purposes but will not consider it as evidence in the case . . .[288]

The question of prejudice and how it is resolved in this situation is interesting and important. While any opinion of Fisher as to what the jury would have done is fraught with speculation, how is this to be handled if a valuable right has been taken away from Wiggins? It this right one of constitutional significance? If so, then would extinguishing the right to put on mitigation due to ineffective assistance of counsel, mean that Wiggins would be entitled to a new trial where the mitigating evidence could be presented?

As to the tactic by Schlaich to retry the guilt/innocence issue again at sentencing, that should not have been done, said Fisher, to the exclusion of the presentation of other mitigating

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[288] *Id.*, at 38. Questioning by way of proffer for appellate court purposes developed by question and answer to Mr. Fisher. The opinion testimony given:

A: (Mr. Fisher) Again, I have done a lot of reading on this particular issue about what juries are concerned about as far as mitigating evidence, The things that are in Kevin Wiggins's background, the neglect, the abuse, really basically abandonment as a child and then when he finally gets into some stabilized situation exacerbation through abuse is extremely strong mitigating evidence.

In my opinion had that been presented, that the outcome of this sentencing would have been different.
Id., at 40.

background information.[289] When questioned concerning the potentiality of this mitigating information producing an unfavorable result:

> First of all you have to develop it and you have to work on how you are going to present it to even made that determination. You can't--saying that you are not going to present psycho-social background information because there is a risk that it can be death with effectively in cross- examination is somewhat akin to saying on a guilt/innocence trial I never present self defense claims; I never present alibi claims, I never do those sort of defenses because there is problems with them.
>
> Every defense has problems but you have to go out and investigate it, develop it, decide on the presentation and then weigh what is going to go on with that presentation in determining whether to use it or not to use it. So as a kind of preliminary step that wasn't done.
>
> Then in addition, again, I just go back to the qualify of this evidence. It is extremely compelling mitigating evidence. I think had he done the background as he should have, when he looked at this evidence it is not a sound decision not to present it. And, indeed, a glimmer of it got to the jury in some form, either the presentence report or something that they picked up because it was in there a little bit but not developed in any way.

[289] P.C. Transcript, 3/30/94, page 46.

> So the notion that there was a tactic in not presenting it makes no sense because it was at least there in the evidence a little bit but not presented in any coherent fashion.
>
> Again, if -- the presentence -- I read the presentence report in this case and there is two paragraphs about Kevin Wiggins' background that just touch upon the problems that he had and nothing more. There is no independent investigation, any kind of workup.
>
> If the tactical decision by Mr. Schlaich was not to present evidence, obviously that is contrary to it because he got it to the presentence report writer in some fashion. But if he had it, at least he had the beginnings of it and he had no resources impediment to doing a further investigation, then he could have and should have gone out and developed it.
>
> This notion that there was a downside, it just doesn't make a lot of sense because he ultimately presents it in some way, at least in very, very limited way. He should have developed it. presented it more fully. He should have developed it.[290]

Analysis and Decision

Numerous cases state emphatically that when the introduction of evidence, when the decision not to cross-examine, when the decision not to investigate, etc., is a matter of trial tactics, there is no ineffective assistance of counsel. Trial tactics is what we are dealing with in

[290] P.C. Transcript, 3/30/94, pp. 47-50.

consideration of this issue. Schlaich had good reasons for the decision he made, some will agree with his decision, some will disagree, and the law stays neutral.

* * * *

[Page 254]

None of the above decisions is on a direct parallel with the facts in this case. To argue differences, is to argue differences that matter not. This court does not accept Fisher's testimony that it was error not to present information along the lines of the Selvog report. Schlaich made a tactical decision and it was reasonable. Further, Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature. Lastly, how do we know what information would have been presented by the State to contradict what was contained in Selvog's report? We have seen instances where the defense does a work-up, the State does a work-up, and the trial goes forward without either because the defense is worried about how wide the door will be opened.

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Appendix G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 29, 2002

No. 01-23
CA-99-2420-JFM

KEVIN WIGGINS
Petitioner - Appellee

v.

THOMAS R. CORCORAN, Warden, Maryland Correctional Adjustment Center; WILLIAM W. SONDERVAN, Commissioner of Corrections of the State of Maryland; J. JOSEPH CURRAN, JR.
Respondents - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and

rehearing en banc is denied.

Judge Motz took no part in consideration of the case.

For the Court,

/s/ Patricia S. Connor
CLERK

Appendix H

Statutory Provisions Involved

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 153--HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the

applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Appendix I

SOCIAL HISTORY OF KEVIN EUGENE WIGGINS

(1) INTRODUCTION

Kevin Eugene Wiggins was born on September 2, 1961 at Sinai Hospital in Baltimore, Maryland. He is now 31 years old. He is one of two children born to Jean Wiggins and Lester Evans. Mrs. Wiggins was married to Donald Wiggins and Mr. Evans was reportedly also married with a "houseful of kids" when the two engaged in extramarital affairs. Kevin has only limited knowledge of his biological father. Father and son have never met.

Kevin has three sisters: India Evans (34) (also a product of the extramarital affair), half sister Charlene Wiggins (33) (daughter of Mr. and Mrs. Wiggins), and half sister Patricia Marvin (20), whose father is unknown. India recently completed in-patient hospital treatment for cocaine abuse and is presently in a group home aftercare program. India has three children whom she abandoned because of her substance abuse. Her children are wards of the State. Charlene lives in Baltimore and has two children.

Mozelle Jones, Jean Wiggins' sister, explains that when India was born Jean was single. India's father, Lester Evans, was married with many children. Jean did not want any children. Nevertheless, on June 18, 1958, India was born at "city hospital," now Francis Scott Key Hospital. Jean was 21 years old at the time. After India was born, Lester Evans ended his relationship with Jean. She began drinking to cope with his

rejection. Jean has been chronically abusing alcohol since this time.

In 1959, during her pregnancy with Charlene, Jean married Donald Wiggins, Charlene's father. (Mr. Wiggins died in 1973.) Mozelle Jones believes, however, that after the Wiggins marriage Lester Evans and Jean Wiggins recommenced their affair, resulting in Kevin Wiggins' conception.

Jean has another daughter named Patricia Marvin. Patricia lives with Mozelle Jones and recently delivered a baby. Mozelle states that Jean, when intoxicated on alcohol, left Patricia (who was two years old at the time) in a taxi cab. Mozelle states that Jean was very cruel to her children.

II. MATERNAL BACKGROUND

(1) Mother's History

Mozelle Louise Jones, Kevin's maternal aunt, states that Jean Wiggins is the third of five children parented by Jake (deceased, 1964) and Mozelle Williams (deceased, 1971). Their youngest brother, Jakey, who has been "in and out of jail since birth," recently died of a brain hemorrhage which occurred after he was beaten while incarcerated in Hagerstown.

Mozelle states that her father worked as a maintenance man for the Essex housing project in Baltimore. Until his death, Mr. Williams worked seven days a week from 6:00 a.m. to 11:00 p.m. Occasionally, he came home for dinner before returning to work. Mrs. Williams was a housewife. She disciplined the children by binding their hands to a bed and then whipping them with a belt.

(2) Mother's Substance Abuse

Jean Wiggins' alcohol addiction is well known. Although she had four children, she abandoned them for days and weeks at a time, leaving them alone with the oldest daughter, India, to care for them. When she did return home, Kevin recalls her coming in drunk, changing clothes and leaving again.

Angela Patterson, Mozelle's daughter, remembers Jean Wiggins:

> My aunt has been an alcoholic as far back as I can remember. She has never had a job. She drank every day -- Richard's wine. She drank in the morning. She often had D.T.'s in the morning until she had her wine; her whole body shook. She'd drink all day, then leave to go somewhere and come back. She'd never eat. She would leave for days and come back with her face all messed up from where she fell. She would get real drunk. She'd cuss and hit me, get in my face and cuss me out. She was very mean when drinking. My aunt slapped me and made me cry. I was scared of her. She was nice until my mother left and then she would look all crazy and start stammerin'. It frightened me.
>
> When I was a teenager, I started to fight back. When I was 13 or 14, I wanted to kill her. She would often talk to herself, like she was talking to someone in the bathroom. She'd talk as if someone was there but no one was there. She had blackouts, once when I was in the room with her and another time a stranger had found her in the street and brought her home. I also remember finding her passed out in the gutter and

calling the ambulance to take her to the hospital. She tried to commit suicide once. She hung by her hands from the second story window. She had taken a bath, was in her nightgown and I heard my mother start yelling at me to come. Jean let herself go and the fall broke her leg.

III. KEVIN WIGGINS' EARLY CHILDHOOD

(1) Maternal Neglect- Malnutrition

India Evans states that she lived with her mother Jean, brother Kevin and sister Charlene in a small two room apartment at 2007 Greenmount Avenue near the corner of North Avenue in Baltimore. Jean was rarely home, leaving the children alone in the house for two to three weeks at a time. Each time she left, Jean would lock the door to the kitchen. India would try to find money that Jean had hidden in the house. She would then use any money she found to buy food for herself and her siblings. Anticipating her mother's abandonment, India hid bowls, a saucepan, spoons and forks to use during her mother's absences, knowing the children would be barred access to the kitchen. They ate mostly junk food and rice, which was the only thing India knew how to cook. She bought the rice at the store and cooked it on the heater or radiator.

India states that a neighbor woman who lived downstairs fed them on occasion. Then India would go to her aunt and uncle, Arthur Williams, Jean's brother, and his wife Heedy Cole, who lived around the corner. India would also go door to door in the neighborhood and she would panhandle outside a local bar. Finally, she would eat from trashcans. India believes she caught a disease from eating garbage because she

developed sores on her legs. The sores became infected and left scars. She was also treated for malnutrition during this time.

India would tell her neighbors lies about her mother when she begged for food. She would say, "Mother had to go out of town because someone died, can you give us things to eat until my aunt comes."

Kevin distinctly remembers his mother leaving them alone and locking the kitchen. Kevin remembers the hunger:

> We were starving. I'd eat paint chips. She would leave us hungry -- so hungry. We'd take a box of cereal and eat together out of a big pot. When she came home she was drunk and thoughtless. She'd come in, change clothes and leave. She'd lock the kitchen even though she would get herself something to eat when she came in. I had no food for days, ate paint chips from the window sill and drank water.
>
> She was very abusive if she came home and found the lock to the kitchen broke. She'd act like we did a crime. She would hit me up the side of the head and throw a book at me.

(2) Physical Abuse

When Jean did return home, she would usually stay no more than one day. If she brought company with her, the children would be kept in the one bedroom with the door closed while Jean would drink with her friend. Kevin recalls that his sisters were beaten often and India received the worst whippings: "Momma whipped all over her body; she was crazy

then."

India was beaten fiercely and more often than her siblings because she would tell her mother that she was responsible for taking money and breaking into the kitchen. Jean Wiggins would beat India with a chair. Jean once whipped the little girl with a white shirt, causing a button to catch in her eye. On another occasion India's nose was split and her head was lacerated when her mother threw her against the radiator.

Kevin states that when his mother returned home, she'd say, "How you all been in this kitchen -- someone in the milk and cereal." She would beat all three children. She would beat India the worst because she was the oldest. Kevin remembers India being beaten with an extension cord and that she screamed while being hit.

India states that at night, she and her siblings were always scared and stayed huddled together. If one child had to go to the bathroom, they would all get up and go together because they were frightened to be alone. They slept with the light on. Whenever they heard an ambulance pass in the night, they fretted out loud whether their mother was in the ambulance: "Hope that ain't our mother in there," India remembers saying.

Kevin states that he and his sisters "stayed scared all the time." He states that, "Every time Jean came home we got a beating for something." Kevin wanted to jump out the window to see if he could fly. His sisters held him back: "I wanted to fly." Kevin recalls wearing dirty underwear and t-shirts and having a nappy head. "I was dirty, hungry. I felt like nothing and was nothing." He cried all the time: "People heard me but no one could help me."

The children would often cry together because they missed their mother. Kevin cried all the time, "When is mommy coming back?" Kevin would wake up at night crying for his mother. India would try to comfort him and tell him that she would be back, but Kevin continued to cry. Many times, Kevin's constant crying drove India to react violently toward her brother.

India remembers her rage when Kevin "was always whining and moaning for his mommy." Frequently she grabbed her brother by the arm, and pulled him into the bathroom. She took his clothes off and placed him across her lap. She took a safety pin, straightened it out, and poked him in the buttocks over and over again, blood oozing from the pin holes, telling him to "SHUT UP!" This was her way of "shutting him up." While stabbing him with the pin, she punched Kevin in the face several times. She states, "I did this often."

(3) Hospitalization Due to Burns Inflicted by Mother

India recalls that one day Kevin set a brown bag on fire while playing with matches and the flames accidentally caught the curtains on fire. Jean, who was drunk at the time, doused the curtains with water and then turned on the gas burners on the stove. She then turned the burners off, took Kevin by the wrists, forced his hands against the hot metal grates and held them there. Kevin screamed in pain, crying and yelling "It's burning, it's hot!" India and Charlene were also screaming for their mother to stop. India could not believe this was happening. She could not believe that her mother was intentionally burning her brother's hands. India remembers looking at her own hands to see if it was happening to her: "It was so horrible!"

After Jean released Kevin, she wrapped his hands with a sheet. He continued to cry and scream in pain. After several hours, Jean began to beat Kevin with a belt because he would not stop crying. She yelled, "I told you not to mess with matches, now stop crying. This is what you get." Kevin could not stop crying. Jean unwrapped his hands which hurt Kevin and made him cry more because the bandages stuck to his flesh. She placed his hands in ice water and then rewrapped his hands. Kevin continued to scream. Jean was finally compelled to take Kevin to get medical care. As they were leaving, India recalls her mother saying to Kevin, "You don't tell them I did this. You played with the stove and stuck your thumbs up there -- if you tell I'll beat your butt!"

Kevin recalls:

I played with matches a lot. I loved the flame. The colors were so pretty. I watched the light under the furnace. I was comparing the colors of the match to the furnace. I was downstairs looking at it.

Suddenly, I heard footprints and screaming. My mother grabbed the back of my shirt and dragged me upstairs. She was fussing, 'You like to play with fire? Look at me! Answer me boy!' She lit the stove real hot. I could feel the heat. I was not scared at that point. Then she grabbed my wrists and stuck my hands on the stove. I felt the sting and the next thing I know I was waking up in a room with something over my face. A woman said not to move and was stroking my head. She was a nice woman and looked at me nice and said "poor baby." She was gentle to me. My fingers hurt and were tied up in the air. I received medication in a white cup. The food was

good: potatoes and gravy and jello; I had never had jello before.

India believes Kevin stayed in the hospital for approximately one week recovering from the burns on his hands. His hands were in a cast suspended above his head.

(4) Sexual Abuse

When India was eight and nine years old she was repeatedly raped by one of her mother's boyfriends. He would come to the house during Jean's lengthy absences. He took India into the bedroom and made her have intercourse with him. India was treated for a vaginal infection at that time. She told her mother about this boyfriend but her mother would not believe her.

Kevin recalls that a man who had a key to the house would come by when his mother was away. He would unlock the kitchen door, set up the cereal for them to eat and then take India into the bedroom. He distinctly remembers the man saying. "Don't dirty nothing - your mother knows when you dirty up the kitchen." Afterwards, India would complain of stomach pains. Kevin felt bad that he couldn't do anything to help his sister. Kevin remembers thinking, "That man is awful; he did something awful."

India says that she and her siblings shared the one bed in the home with their mother even when she had a man sleeping with her. Jean, heavily intoxicated, would have intercourse with men while her children were in the bed. India recalls poking sticks up her mother's vagina while she lay passed out on the bed.

(5) General Neglect

India states that during Jean's frequent and lengthy absences, Kevin would injure and degrade himself when he became upset. He banged his head against the wall, spit on himself and scratched with his fingernails from the top of his forehead downwards across his face to his chin. Kevin often remained home alone while his sisters attended school during the day. Being left alone especially frightened him.

The house was continually filthy. Jean never cleaned and dirty clothes lay about throughout the house. There was no soap with which to wash anything. India states that she and her siblings never received anything for Christmas when they lived with their mother. They did not celebrate Christmas. The only toys they had were given to them by neighbors. It puzzles India that other relatives who were aware of the situation did nothing to intervene.

Finally, when India was nine years old she told the principal at school (P.S.#7) about her situation and the children were placed in foster care.

[India says that she left the Miners' home (her last foster placement) when she was 20 years old. She began drinking alcohol after she left. Five years ago she began using crack cocaine. She was haunted daily by memories of her mother's abuse and the man who raped her while they lived on Greenmount: "It pops in my mind each and every day." She used crack cocaine to block the memories.]

IV. FOSTER CARE PLACEMENT HISTORY

A. Petition of Neglect and Abandonment

According to case workers Nadia Grove and Willie Dawkins, the following factors precipitated the removal of the Wiggins children from their mother's care:

> On 2/6/67, Policewoman Franz . . . petitioned Juvenile Court, having found the three children of Mrs. Wiggins apparently abandoned by their mother. The mother had apparently left vague instructions with the woman who occupied the apartment beneath her about finding the children and this woman, name unknown at the time of this dictation, had been semi-supervising the children for several days. Details of this situation will be known after the commitment hearing, which is scheduled for 3/6/67, and at this time it is only known that Mrs. Wiggins has acknowledged that she was hiding from the police during the day, since she believed there was a warrant out for her on charges of assault. Mrs. Wiggins claims she was returning to the home at night, but the children have stated that she was not there . . .

Mrs. Wiggins has a known alcoholic problem, that is evident in an interview. She states she also has kidney trouble, or a difficulty with her bladder. It is clear to me that Mrs. Wiggins drinks a good deal. When I asked her about this, and she denied it, she stated, "I don't really drink, I just drink beer." And then her eyes really lit up, and she gave me a broad smile saving, "I LOVE beer!" She told me that she drinks with her girlfriends, and that they treat her.

When I asked her how much beer cost, she gave me the price for quart bottles automatically, as though she never consumed a lesser amount.

Mrs. Wiggins is a complaining and sometimes sullen woman, but on the two occasions I have met her since the placement of the two children, she very quickly changed her attitude from one of extreme anger to a rather curious joviality, directing her anger at PA, and seeming in many ways very unconcerned about foster care, and amused by the CD worker's questions. She joked and laughed at her own misadventures, and was very amused with herself when in signing the medical consents for the children she found that her hand trembled so she could scarcely make a legible signature. I would say with CD she has been cooperative to the extent that she is able. I can see that Mrs. Wiggins could be very disagreeable if she chose, however. She related to me her feelings when she stabbed a man recently. . . She stabbed him with a can opener, and he needed to be treated at Mercy Hospital . . . Later she said, "I tried to eat him up, I wanted to kill him for taking my money.". . . She told us she had never had enough money on welfare for herself and the children, and stated, "I go lacking for them, and I need more than they do."

. . . These children had obviously been very very neglected, although they were reasonably well clothed when they entered foster care. They told the policewoman on 2/6/67 that they had nothing to eat since 2/4/67, when their mother had returned to the home and given them each a bologna sandwich. India Evans stated that she had seen her mother on the

sidewalk from the police car, and she showed no regret or concern about her mother. While Charlene did seem to want to defend her mother a little bit and told me that their mother had bought them lots of lovely clothes which were at home. India and Kevin, when foster care was explained to them, agreed readily that it would be very nice to go to a foster home, and were not at all unhappy about their mother's not being along with them, as they encountered this move.

B. Tinkler's Home (2/6/67)

Kevin and his two sisters were initially placed in the home of Mrs. Laura Tinkler for emergency foster care. Once the family arrived at Mrs. Tinkler's, the children were required to attend the House of Prayer with the Tinklers each and every evening from approximately 8:00 p.m. to midnight, even though they were to attend school the next day. They attended church services all day on Saturdays and Sundays. On Saturday they had to fast until 2:00 p.m. The church was some distance from the house. It was a charismatic service which included people shouting and falling down. The church was very noisy. India recalls feeling very tired the next school day. The daily routine consisted of school attendance, homework, chores and church attendance until midnight.

India believes that she and her siblings were transferred to Mr. and Mrs. Miner's home after it was discovered that Mrs. Tinkler was physically abusing the children. During a physical examination, doctors saw marks and scars on the children's bodies which were made by Mrs. Tinlder's fingernails. She would pinch and twist the children's flesh, leaving wounds. Charlene states that Mrs. Tinkler tried to deter her from sucking

her thumb by biting it, and she would beat her and her siblings with many different objects.

C. Miner's Home (3/29/68-9/8/77)

Kevin, his sisters and several other children lived in the home of Lenore and Charles Miner. The number and names of the other children fluctuated over the nine years that Kevin lived in this home. Kevin describes Mrs. Miner as a controlling person. She would give each of the children chores (i.e., sweeping steps, separating the clothes for washing and wiping windows) to complete on the weekends and would not allow them to be out after 8:00 p.m. If the children disobeyed her, she would beat them with either her fist or another object such as a switch. Mrs. Miner was reportedly an aggressive woman who ruled her household in a militaristic manner.

India remembers that Mr. Miner would force Charlene to undress and stand naked while he gawked at her for five to ten minutes. Charlene was 11 or 12 at the time. Mr. Miner chose Charlene rather than India for this abuse because Charlene was physically more developed than India. India once challenged this practice of humiliating Charlene. Mr. Miner then told India to strip her clothes off and then whipped them both with a belt. After that incident, however, he stopped making Charlene take her clothes off. India also recalls Mrs. Miner beating them with a belt or switch and sometimes both. She would stand up, place the children's head between her shins and switch them at least ten times across the buttocks. The strokes left welts.

Kevin states that, in spite of his disagreements with Mrs. Miner, she was a good woman with strong morals. Kevin says that the years that he lived with Mrs. Miner were the best years

of his life.

When Kevin began to live with the Miners, Charles Miner would wrestle with him. Kevin was eight years old. Mr. Miner pulled Kevin's pants down and fondled him. He eventually digitally penetrated Kevin's anus and attempted penile penetration on many occasions. This occurred as often as every day to once a month. When the sexual molestation first occurred, Kevin told Mrs. Miner about it. She called him a troublemaker and a liar. Kevin, with difficulty and shame, remembers the sexual abuse:

> It happened two or three times a week, sometimes everyday – always during wrestling down in the basement. While wrestling he'd pull my pants down. He'd use some grease or Vaseline and if I would get to making a noise he'd say "okay – I won't go any further." He kept trying though and I remember specks of blood after he did. Mr. Charles would play with me, he didn't penetrate, just fondling. He'd call me his "little man." I was starved for attention. Mr. Charles would say, "You can take it, my little man."
>
> I have a confusion about Mr. Miner. Now I see it – Mr. Miner doing it to me. Sometimes, I would like it. I would accept it; I would help it sometimes; I would do it. When I was younger I wanted to be around him; I'd prop up on his lap. Sometimes I initiated it because I wanted to be with him – it really messed with me. I'd ask myself, "Why a male child?" It messed with me. I wanted a father and mother real bad. I remember as a little kid, sitting on the porch and seeing the family next door taking family trips. I'd hear, "Everybody in the car. Okay dad." I wanted

a dad and mom and when I was 20 I was still looking for a dad and mom.

I was nice to Mr. Charles when I shouldn't have been. Even when I knew what he was doing, I got on his lap and stuff. Mr. Charles would rip and run on Mrs. Miner. He spent more time with me than anybody and he made me feel special. When he came in he'd say to me, "Here I am!" He'd buy me candy and cupcakes.

When it first started with Mr. Charles, he put something on his hand. He said, "If you can take all this finger in, you're a man – come on, come on, you can do it. Don't be tense, try not to be tense." He'd help me with my breathing. (The second time it happened I told Mrs. Miner and she said I was a liar and a troublemaker.) I was feeling strange but I was getting used to it; it started to feel natural, with the finger then. I took his hand but I felt like I wanted to go to the bathroom and I'd go to the bathroom. That's when I wasn't eating. Things happened so fast. I couldn't understand. Was it right? I guessed it was especially since Mrs. Miner said I was just being a troublemaker. I learned it didn't do any good to scream; no one believes you; they turn the other way. Life is crazy, bizarre.

Mr. Charles would look me in the eye and tell me he loved me. I loved him as my father. I could of been a real son to him. I felt he cared about me. Sometimes he did it with me everyday. Sometimes it wasn't for a month. I'd miss him. I'd ask him, "Did I do something wrong?" He'd say he just had some

things on his mind. I felt guilty when I thought he was mad.

According to Kevin, Mr. Miner worked loading trucks for B.E. Green in downtown Baltimore. Kevin stated that Mr. Miner was nervous and smoked two to three packs of cigarettes a day. He remembers the house clouded with smoke and 20 to 30 cigarette butts in the ashtrays. He seemed to Kevin to be a depressed man. Mr. Miner's hand was amputated because of disease.

Corresponding with the onset of his sexual molestation by Mr. Miner, Kevin was unable to eat. Mrs. Miner could not get him to eat. Kevin would put sausage and pancakes in his pockets as well as his dinner, which included steaks, and throw them away. He states, "There was too much on my mind." Mrs. Miner beat Kevin for not eating and for throwing his food away. He lost weight and his ribs stuck out. He was taken to the University of Maryland hospital and he was given a yellow, chalky tasting medicine which helped his appetite to return.

While at the Miners, Kevin was psychologically tested on August 6, 1968. The follow-up report, prepared by caseworker Frances Newby on August 8, 1969, states:

> Kevin continues to have very poor self-help skills. He puts his rubbers on wrong feet, socks on inside out, and in the wrong position to fit his foot properly. He cannot button his shirt so that the button holes and buttons match evenly from top to bottom. Kevin is extremely lethargic about dressing, eating, and doing most activities. His memory seems poor. If the fostermother sends him upstairs on an errand to fetch something, he forgets what he has gone for on the

way. If she tells him about something and asks him a few minutes later what she has said he has forgotten it.

. . . He seems happiest when playing by himself and with his toy soldiers. These he lines up and knocks down over and over again rather than playing creatively with them. *Kevin still has difficulty distinguishing between fantasy and reality*. (emphasis added). He described seeing camels grazing by the roadside (he may have mistaken this for another animal but the foster mother stated she saw no other animals in sight) and other incidences from his mind as if they were real.

Kevin's attention span is very, short. He has poor ability to concentrate. He seems somewhat anxious and nervous but not hyperactive. Kevin cries easily when he cannot have his way. He is extremely hard on clothes. He comes home very dirty and messy. He does not verbalize much on his own initiative. He also does not like physical affection from the foster mother.

A psychological evaluation by Sarah T. Strata prepared on October 14, 1968 states:

> Kevin. . .has large eyes which usually have a staring expression. His bodily movements are lethargic, his voice is generally soft and with flat vocal tones. In general he seems to be an emotionally flat and expressionless child. When asked, he did not know how old he is.

Department of Public Welfare records state that Kevin was taken for psychological testing because of unusual behavior at home and difficulty in school. On March 11, 1970, BCH (Baltimore City Hospital) stated that, "Teacher reports . . . fails asleep in class. At other times he runs around the room and disturbs the other children. His work is . . . complicated. She says he exhibits peculiar behavior."

On December 22, 1970, Mrs. Miner took Kevin to be evaluated by Dr. Rosario Dancel, pediatrician. In a report dated February 9, 1971, Kevin was found to have a full scale I.Q. of 72. Dr. Dancel wrote:

> Kevin is underachieving, hyperactive and observed to have 'staring spells' frequently. These latter symptoms are the concern of the school. He was showing learning difficulties from the time he started school at six years of age. An I.Q. test at that time was reported to be 72. He repeated the first grade and then was placed in a special curriculum class. Even in this class, however, he is adjusting very poorly. He is hyperactive and has a very short attention span. He hasn't learned the alphabet yet in the two years he was in school. The foster mother claims he was slow from the beginning, but is not hyperactive. He stares blankly oftentimes but could be aroused by loud noise or voices. . . Blank staring was also noted but not that of petit mal seizure.

Dr. Dancel also referred him for an electro-encephalograph, which was performed by Dr. G.G. Sutton. A highlight of Dr. Sutton's results state: "The findings suggest seizure disorder without evidence of a discrete epileptogenic focus."

According to John Martin, caseworker, on October 10, 1973, he wrote:

> The children haven't seen their mother since placement in the Miner home and Mrs. Miner states that she has heard nothing from Mrs. Williams [Wiggins] at all. I asked the children if they would like to have a visit with their mother and they all answered yes. I told them I had been trying to locate their mother but had had no success yet but that I would continue trying to find her.
>
> I didn't meet Mr. Miner but Mrs. Miner impressed me negatively. This lady is overweight and walks like a first sergeant. She impressed me as grossly loud and overpowering although the 3 children who were present for my entire visit didn't seem intimidated in any way – I feel sure that Mrs. Miner rules them with excessive authority.
>
> Mrs. Miner said she does spank the children with a strap, shoe or hand when they need punishment. I pointed out to her that this corporal punishment is against agency policy and that she should punish the children by methods such as communication, counseling, withdrawal of privileges, extra duties, confinement at home and so forth.

On April 22, 1974, John Martin stated:

> Kevin is in Special Education class at Edgecombe Elementary School, where he makes C's in all of his classes. He gets 2 in conduct as a result of being noisy and disruptive in class.

Kevin remembers being confused about his life: his mother starving and beating him, Mr. Miner sexually molesting him, and Mrs. Miner refusing to believe him. However, he would not tell them what was on his mind. He was very puzzled by the conflicting messages he was getting from Mr. and Mrs. Miner: "She showed she cared and then she didn't." Kevin could not understand what he was doing to receive the treatment he had received in his life.

Kevin says that, as a child, he learned how to block things out of his mind. Sometimes he would lose touch with days. He states:

> I wanted to lose touch, blank out. It felt good not to think about nothing: I'd do it often – see nothing, think nothing, clouds, sky, remember nothing. If a memory popped up I'd say, "Who was that kid. I didn't know him." If it kept coming up, I'd have to get into a shower because it felt slimy.

Mrs. Miner arranged for Kevin to be psychologically (IQ) and physically (EEG and tests run on thumbs) tested within the first years of his placement in her home. In this respect she afforded him the medical treatment he needed as well as the proof for the schools that Kevin needed to be placed in a special learning class.

Mrs. Miner did not deny physically abusing the children with something other than her hand. Kevin also reported that Mrs. Miner would not grant him privacy in the bathroom. She would often come into the bathroom while Kevin was bathing. Verbal confrontations over this matter caused Kevin to run away from home. He went to an emergency shelter and reported that he was homeless.

In January 1975, Ann Mooney became the new caseworker for the Wiggins children. Ms. Mooney noted that all three children were having behavior problems in school. She wrote, "Kevin especially has difficulty as he is hyperactive." In September 1975, caseworker Elizabeth Birt noted that, "Due to Kevin's hyperactivity, Mrs. Miner has conferred with his teachers and counselor. It is shown also that his work habits and conduct were unsatisfactory."

On April 6, 1977, Department of Social Services had a critical shortage of caseworkers. Consequently, the Wiggins children were dropped from the case loads and their placement was no longer monitored. If any problems arose, Mrs. Miner was instructed to call a family service caseworker.

After the Wiggins children were dropped from their caseworker's list, problems arose. According to the DSS worker Myra Hill:

> On 9/8/77 Ms. Barbara Pryor, Service Supervisor, received a call from Family and Children's Society. It seems Kevin Wiggins, age 16, and in foster care, had been directed there and he was reporting that he was homeless.
>
> . . . According to Kevin, there had been another confrontation between him and his foster mother. As a result of this conflict, Kevin reports that he was ordered by the foster mother to leave. Kevin also informed worker that an older sister, Charlene, who had also been in the home, had left the foster home a few weeks earlier under similar confrontation.
>
> . . . Kevin had such complaints as Mrs. Miner would

> not grant him privacy in the bathroom. Kevin stated Mrs. Miner often came into the bathroom while he was bathing. Kevin was also stating that Mrs. Miner often disciplined them physically, at times with something other than her hands.
>
> According to Mrs. Miner, she had requested several months ago that these children be removed. Mrs. Miner was stating, "they were alright until they got to be teenagers." Mrs. Miner's tone of voice and attitude impressed worker as being one of demanding and dominant sergeant, and as such she would not tolerate any insubordination in her home. She asked that neither of the children be returned to her home . . . Mrs. Miner reported that she and Mr. Miner have been separated this past year.

Ms. Hill referred Kevin for a clinical evaluation on October 5, 1977. In her referral application she stated, "Kevin gives the impression of having a disoriented thinking process. Kevin also appears to have difficulty in recognizing familiar objects and/or places."

D. Ware's Home (9/19/77-1/31/78)

Prior to this placement, Kevin had stayed with Mrs. Hunter, a family friend, for approximately eight days. While at the Hunter household, Kevin had given away all of his clothing to the other children in the household. He therefore arrived at the Ware home without any clothes. Shortly after his placement with Mrs. Adeline Ware, Kevin reportedly refused to eat (claiming his throat was sore) and slept on the floor of his bedroom. He stated that he was used to sleeping on the floor. Kevin was reportedly nervous and remained somewhat isolated

from the other three foster children throughout his stay.

Kevin's caseworker noted:

> Mrs. Ware was concerned that Kevin was refusing meals prepared by Mrs. Ware. Mrs. Ware had learned that morning, from the other foster child with whom Kevin shared a room, that Kevin had been sleeping on the floor. Mrs. Ware had confronted Kevin on both issues. Kevin responded that his throat hurt too bad for him to eat, yet he refused medical attention. Kevin told Mrs. Ware that he was accustomed to sleeping on the floor.
>
> Mrs. Ware has observed some nervousness in Kevin's behavior. He remains somewhat isolated from the other children in the home.
>
> Worker saw Kevin later that day in the office. Worker tried to get Kevin to talk about these things. Kevin had seemed confused when talking to him on earlier occasions. Today Kevin's thoughts were totally disoriented. Nothing he said made sense. Worker discussed with Kevin worker's plan to do a psychological evaluation of him. Kevin was reluctantly agreeable.
>
> Kevin had learned of his sister's desire to return to the former foster home. This had put Kevin further into a frenetic state. Kevin was at the same time asking to be returned to former foster home, placed in a group home and to remain at the Ware home. Worker spoke with Mrs. Ware again on 9/28/77 at which time Mrs. Ware was puzzled by unexplainable money which

> Kevin always had in his possession. Kevin had asked Mrs. Ware that morning if he could remain in her home as long as he needed foster care.

In December 1977, Myra Hill, caseworker, stated that she believed Kevin's behavior problems were the result of a physical, emotional or mental disorder.

In January 1978, Kevin's school principal, Gorann Steele, stated that Kevin regularly came to his office: "Kevin would sometimes come in crying other times he was being somewhat hostile." Myra Hill wrote further:

> . . . At that point it was as if something clicked inside Kevin. He started to jump to his feet- Kevin then made the remark "all of you think I'm crazy." He asked if worker wanted him in Crownsville Hospital. This was followed by a period of wild excitement at which point Kevin uttered things which made little to no sense. . .
>
> Reportedly Kevin had gone to Mr. Steele's office that day to tell him that he had found a lady to adopt. Mr. Steele thought this was an unusual remark for an adolescent his age. Mr. Steele shared with worker that he admired Kevin but he hoped Kevin would not form a dependent relationship with him. *Mr. Steele was also disturbed about Kevin's almost total disorientation to reality.* (Emphasis added)
>
> Worker intended to have another psychological evaluation done as soon as possible. Another appointment is scheduled for 1-23-78 at Constant Care Program from the extreme of behavior exhibited

by Kevin, it is worker's feeling that a restricted type group placement is most appropriate at this time.

E. Hunter's Home (1/31/78-4/21/78)

Kevin lived with Mrs. Louise Hunter for approximately three months. Two of the Hunters' sons and two male boarders lived at the residence at the same time as Kevin. It was the foster care worker's impression that Mrs. Hunter was more concerned with the financial support offered to foster parents than about Kevin's well being. Mr. Hunter was not living in the home at the time; however, he did visit on occasion. During his visits, he and Mrs Hunter would engage in "drinking brawls", which according to Kevin happened more than once.

Kevin did not assume responsibilities (i.e., cleaning his bathroom) while in the Hunters' home and engaged in a verbal disagreement with Mrs. Hunter over this matter. Kevin left, the home following this argument and returned to the home of Mrs. Lenore Miner.

On April 21, 1978, Myra Hill stated that, ""Worker will continue to seek some type of supportive psychiatric services for Kevin. Kevin's behavior has appeared very erratic at times making it extremely difficult for this agency or any foster parent to plan appropriately for him."

F. Miner's Home (4/21/78-11/5/78)

Kevin returned to Mrs. Miner's home once again, as it represented the only stability he had known in his life. While at the home, Kevin "smacked" another foster care child. It was reported that he was angry with Mrs. Miner but reacted physically toward a young girl in the home.

In May 1978, Myra Hill noted:

> Kevin's school record also contained results of a psychological evaluation done on him at the University of Maryland Hospital on 2/22/75. The report contained recommendations which were never followed-up by the school system or this agency. Kevin had not had any problems with attendance until May of this year . . . Mr. McDonald and Mr. Stills, the principal, have noticed Kevin is always trying to get the attention of his peers. They have also observed that Kevin has a low self- concept.

In June 1978, Principal Steele informed Ms. Hill that Kevin was fighting in school. "Mr. Stills feels Kevin is not a delinquent child just a confused child." A school screening committee underscored Kevin's isolation from peers at school and his inability to "get along with his peers."

On August 17, 1978, Ms. Hill reported that, according to Mrs. Miner, "Kevin's uncontrollable temper and behavior had gotten him fired from his summer job." Because of his aggressive behavior with the younger children in the Miner foster home, Kevin was removed and placed in a different home.

G. Blackwell's Home (11/6/78-7/11/79)

Kevin resided in the home of Mrs. Martha Blackwell for approximately eight months. Mr. Blackwell had been bedridden for several months before Kevin's arrival and died after Kevin had been in the home for twenty one days. In addition to Kevin, there was one adopted child and six foster children in this home.

The Blackwells lived at 5010 Norwood. Ms. Blackwell's sons, Rocky and Herbert, lived there as well. Marvin, Kevin's foster brother, and Kevin were sexually molested by Rocky and Herbert. Kevin was 16 at the time. When it first happened, Rocky and Herbert called Kevin downstairs to "get high." Marvin warned him not to go down. Kevin did go downstairs and was knocked unconscious. When he woke up he was "messed up", raped. This happened to Marvin as well.

Kevin believed that Ms. Blackwell knew it was going on. She told Kevin that he would be all right. Kevin remembers being in the bathroom and he felt "like my insides were falling out." Marvin gave him some medicine for hemorrhoids to put on his wounds. Kevin couldn't hold his bowels and he couldn't walk for several days. Although Ms. Blackwell kicked her boys out of the house after this incident, they were back several days later. Vicki, another foster child, was raped by the brothers as well. Kevin stated, "They were doing everybody."

From November 1978 to June 1979, Myra Hill wrote:

> Kevin had generally made a fair adjustment to foster care. He had had six placements in foster care. Four of these placements have been within a 1 and 1/2 year period. Kevin was probably experiencing his adolescent identity crisis.
>
> . . . It seems Kevin had granted permission for the other foster boys to use his things freely, but now Kevin wanted to change his mind. Worker made h/v [emergency home visit] that afternoon. Kevin was a little more than annoyed. *Kevin's speech and reflexes were unusually slow, he had a dazed, wide-eyed expression throughout the visit* (emphasis added).

> . . . For the next few months Kevin's behavior became more deliberate and in some instances more extreme than usual. On 1/25/79, Mrs. Blackwell called to report that Kevin was not going to school since losing his job. Kevin had been deliberately violating household curfew. He was coming in the house at 11:30 p.m. Mrs. Blackwell felt his way of thinking was becoming disoriented. He has no logical explanation for any of his behavior reactions . . . Mrs. Blackwell has relayed that during periods of the night, Kevin goes outside without his shirt and shoes. The winter of 1979 was unusually cold for most of us . . . Reportedly Kevin did not pass the written entrance exam at the Army Recruitment Center.
>
> . . . On 5/15/79 received t/c [telephone call] from Mrs. Blackwell, Kevin had been arrested on 5/14/79 between 2-5 am. Reportedly Kevin had stolen some gasoline or kerosene and attempted to set fire to the front of an area carry-out shop. Afterwards he entered the store, did not find any money, so he stole some cookies. . . . Supposedly his participation in the Job Corps would dissolve any court action.

It was at this time in his life that Kevin disengaged from school. He stopped going altogether during his eleventh grade year. Kevin left the home when he was eighteen years of age and joined Job Corps in July 1979. Kevin's commitment to foster care was terminated in September 1979.

Constant Care Community Health Center staff member Lawrence Hines, MSN, conducted an evaluation of Kevin. He wrote:

> He was referred because of strange and bizarre behavior. Patient is described as being quite infantile at times and extremely hostile at others. Due to an inability to remain oriented to time, place and person, there is a history of forgetting events and causing problems in the foster home. During the psychiatric examination he was unable to do the serial seven series and his intellectual capacity was far below that of a 16 year old. He is unable to abstract or conceptualize, but there is no evidence of hallucinations or delusions. Impression: Mental retardation with cranial pathology. Suggest: Physical exam and brain scan, reeducative therapy (?head trauma).

On March 29, 1979, brain scan and C.E.F. were normal. The results of the above evaluation and brain scan were made available to DSS (Department of Social Services) on April 12, 1979.

V. JOB CORPS

Kevin was befriended by Mr. York, a Job Corps Administrator, and was subsequently sexually abused by him. Kevin states, "Every time I get close to someone, something happens." Kevin was a resident at the Woodlawn office in Baltimore for approximately two years. Mr. York was the director. Kevin did not have a home to return to during the holidays. Subsequently, he would remain at the Job Corps facility during these times. Mr. York noticed this and began to take Kevin to movies, restaurants and recreation. Kevin explains, "It was nothing weird or funny at this point." Eventually, Mr. York brought Kevin to his house after he had been drinking. He made sexual advances toward Kevin and

they became sexually involved. Kevin felt bad and Mr. York said it would not happen again, remarking "You can still be my son."

Kevin returned to Mr. York's some time later and, Kevin believes, Mr. York slipped something into his drink which made him fall asleep. Kevin woke up and knew he had been anally penetrated. Kevin believed Mr. York was sexually involved with other young men and that he was fired for these allegations. After he was fired, Mr. York continued to contact Kevin and asked him to live with him. He told Kevin that he was in love with him and begged him to live with him.

When the relationship first began, during the first two weeks, Kevin thought he might be adopted or he hoped he might. This thought "renewed my faith" for a while. However, after the sexual involvement occurred, he thought, "People are nice when they want something." He was 18 years old when he entered the Job Corps. Although he graduated after two years with a diploma in food service he could not comprehend what he read.

VI. PSYCHOLOGICAL EVALUATIONS, MENTAL RETARDATION

On October 14, 1968, Sarah T. Stram, consulting psychologist, found the following:

> Kevin is a child of borderline mental retardation. On the Stanford-Binet Scale he obtained a mental age of 5 years and 2 months, and an I.Q. of 72.

Rosario Dancel, M.D., conducted an evaluation on February 2, 1971. He concluded:

> In summary, Kevin is functioning at the upper educable or borderline retarded level with achievement scores in keeping with his general abilities. There are no physical or neurological basis found for his frequent staring. These are most likely habits and have no significance. I have spoken to Miss Johnson, the school teacher, and she feels that his hyperactivity is controllable. Diagnosis: Borderline intelligence.

On March 23, 1978, Kevin was referred to Lutheran Hospital due to strange and bizarre behavior in his foster home. He was described as being quite infantile at times and extremely hostile towards others. The psychological testing found Kevin to be mentally retarded, with chronic pathology. A brain scan was also performed at this time but found no abnormalities.

VII. POST FOSTER CARE

Following his release from Job Corps, Kevin lived with his cousin Angelo Glispy. Mr. Glispy states that Kevin worked steadily and always paid his rent on time. Mr. Glispy states that Kevin "hated his mother" and was a loner. He spent most of his money on clothes.

From 1982 to 1984, Kevin worked as a porter for a company called USF&G. From approximately 1985 to 1986, he worked security with Madison Contractors. From 1986 to 1988 he worked security for Laughlin Security, and STOP Security. In 1988, he washed dishes at the Backfin Restaurant.

During the eight years following his release from foster care, Kevin was homeless at times. He lived with a variety of

different people who befriended him on the streets.

VIII. SUMMARY CONCLUSION

From birth to age five, the most critical years of psychosoeial development, Kevin Wiggins was severely neglected and violently abused. The impact of neglect in abusive households on children has recently been examined by the U.S. Department of Justice's National Institute of Justice (NIJ) in a report titled "The Cycle of Violence".[1] The research conducted in this report found that "a study group of abused children had a 40 percent greater chance of future juvenile delinquency and adult criminality than non-abused children." A summary of the findings further stated:

> The study reaffirms the "cycle of violence" hypothesis for abused children, but also highlights the impact of neglect on future behavior. Neglect, for the purposes of the study, is defined as "extreme failure to provide adequate food, clothing, shelter, and medical attention to children."
>
> Victims of neglect are more likely to develop violent behavior than other children, the study shows. In fact, when the effects of specific types of maltreatment are measured, the neglected/abused group showed the second highest number of violent offenders. Sixteen percent of physically abused children later were arrested for a violent offense. Only five percent of those who were sexually abused were later

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[1] The Cycle of Violence, U.S. Department of Justice, National Institute of Justice, published in the National Criminal Justice Association Juvenile Justice, March 1993.

apprehended for a violent creme.

> While the NIJ study did not examine other developmental problems associated with childhood neglect, it referred to recent research that shows neglect can cause attention deficits, reduced social skills, and poor emotional stability in children. Considering that the incidence of neglect is almost three times that of physical abuse, the NIJ study suggests that far more attention needs to be devoted to families of children whose "beatings" are forms of abandonment and malnutrition.

The developmental problems cited in the above article are well-documented at every stage in Mr. Wiggins' history. Clearly, he was impaired throughout his life by the effects of neglect, abuse, abandonment and malnutrition during his most vulnerable and tender years.

Although intervention was enacted which led to Mr. Wiggins and his siblings being removed from the home, abuse persisted in the foster homes. For Mr. Wiggins, sexual molestation, rape, was the most pronounced trauma added to the list of abuses he has survived.

The profound and damaging consequences of sexual victimization have recently been well documented. In *The Universality of Incest*,[2] Lloyd Demause writes:

> The time when one could deny that sexual seduction is extremely traumatic for children appears to have

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[2] Lloyd Demause, "The Universality of Incest," The Journal of Psychohistory, Volume 19, Number 2, Fall 1991, pp. 139-140.

> ended. The more studies that come out on the effects of childhood sexual abuse, the more severe the damage is found to be. The flood of books and articles documenting the emotional problems of victims both in childhood and in later life has to be read in detail to appreciate the profound sense of betrayal and the terrifying fears felt by the child, so that even single incidents have the power to permanently ravage their lives. Severe somatic reactions, depersonalization, self- hatred, hysterical seizures, depression, borderline personality formation, promiscuity, sexual dysfunctions, suicide, self-mutilation, night terrors and flashbacks, multiple personalities, post-traumatic stress disorders, delinquency, bulimia, and the overall stunting of feelings and capacities have all been documented -- the earlier and the more often the abuse, the worse the damage.

Dr. Marie Fortune estimates that 90% of all sexual abuse victims are victimized by someone they know. Further traumatizing the horror of the situation, Dr. Fortune also states that these cases are more likely to go unreported, and thus untreated, than are those cases of abuse by a stranger. In her book, *Sexual Violence: The Unmentionable Sin*,[3] she states that sexually abused children will often develop specific coping skills, including isolation and detachment and a mistrust of adults. Additionally, the child may suffer from confusion between sex and affection, low self-esteem, and destructive behavior. A child may undergo behavioral changes in an attempt to resolve his distress. This may include regressive

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[3] Dr. Marie Marshall Fortune, *Sexual Violence The Unmentionable Sin*, Pilgrim Press, New York, 1984, pp. 163-175.

behavior, such as bed wetting, drug and alcohol abuse, and sexual play. Furthermore, delinquent behavior may ensue. Often the child is punished for these actions, rather than recognizing and treating the underlying cause, resulting in further repression of the abuse. Psychologists estimate that 88% of sexually abused adults had repressed the memory of their abuse completely for as long as 10 years, and those that did tell their story received little help or support.[4]

Kevin Wiggins bore the secrets of sexual victimization and the terror of violent abuse and neglect into his adolescence and, from there, into young adulthood. Throughout his years, evidence of the psychological damage sustained from his upbringing emerged again and again. Plainly, the horror of his violent childhood environment and the indelible trauma of sexual assault throughout his formative years, combined with borderline mental retardation, impaired his development and significantly contributed to his involvement in the present offense.

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[4] Herbert S. Strean, "Effects of Childhood Sexual Abuse on the Psychosocial Functioning of Adults," *Social Work,* September-October 1988, p, 465.